

CHIBLI MALLAT

From Islamic to Middle Eastern Law  
A Restatement of the Field  
(Part I)

*So viele Berichte,  
so viele Fragen*

—Bertolt Brecht<sup>1</sup>

Any approach to law in the region known as Near or Middle East is doubly selective, as the historical depth of the tradition enhances the diversity of cultures active in the contemporary world.<sup>2</sup> Law is a particular example where the contrasted set-up which characterizes twenty-five or so modern Nation-states is as much a product of a sophisticated and ancient history as it is the result of heavy requirements imposed by the pace of the recent transformation of the area. Western influence on Middle Eastern law in its contemporary operation is pervasive. But whether in the Bible, the Qur'an, and earlier in Hammurabi's Code, concern with law is a century-old phenomenon.<sup>3</sup>

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1. "So many reports, so many questions", in the poem "Fragen eines lesenden Arbeiters" (Questions of a reading worker), Bertolt Brecht, *Svendborger Gedichte* (1939), *Werke*, 6 volumes, (Frankfort 1997), iii, 293.

2. I use the standard transliteration of non-western words adopted by specialized journals, but the diacritics are omitted. To avoid hampering the flow with too many non-English words, while keeping the original available, I tried to make the text lighter by placing as many non-western words and phrases as possible in the footnotes. Also, the Arabic *'al al-ta'rif* was sometimes dropped for aural convenience, e.g., *Sarakhsi* instead of *al-Sarakhsi*, and *Mabsut* instead of *al-Mabsut*. Most dates are given in the Hijri calendar (AH), which starts in 622 of the so-called Common Era, followed by the corresponding date in the Christian Gregorian/Common era (CE). When only one unspecified date appears, reference is to the CE.

3. In addition to ascertaining the source, references have been limited to those articles, books and journals that either are authoritative in the field, or offer a useful introduction to the reader. For a bibliographical overview of Middle Eastern law, see the author's two essays on "Islamic law: reflections on the present state in western research," *al-Abhath* (American University of Beirut), 43, 1995, 3-34 and on "The state of Islamic law research in the Middle East," 8 *Asian Research Trends* (Tokyo) 109-36 (1998); these essays appear in a slightly different version in French as "Le droit en Méditerranée musulmane: perspectives de recherches," in R. Ilbert & R. Deguilhem (eds.), *Individu et société en Méditerranée musulmane- Questions et sources* 25-47 (Aix 1998); and "L'état de la recherche en droit musulman au Moyen-Orient," 61 *Travaux et Jours* (Université Saint Joseph, Beirut) 231-60 (1998).

The historical wealth of available legal documents is probably unmatched in the rest of the planet, and many lengthy and complex treatises have yet to be uncovered. The constraints of the historical dimension on an introduction to the Middle East legal systems represent the vertical depth of the analysis. A history of Islamic law, let alone of Middle Eastern law, is yet to be written.<sup>4</sup>

The complexity of the system, as it presently operates in a motley assortment of democratic, republican, monarchical or tribal states, offers to the student of Middle Eastern law a second, horizontal challenge. By Middle East is meant here the geographical area extending from Morocco and Mauritania on the Atlantic, to Afghanistan and Pakistan in Asia, including the twenty one Arab countries formally members of the Arab League in Asia and Africa, Palestine-Israel, Turkey and Iran.<sup>5</sup>

With all the historical and synchronic diversity in the region, a comprehensive approach to the discipline can depart from a premise which may be useful if taken as a relative guiding point of historical sedimentation: that the common law of the Middle East, in so far as it can be discerned, is Islamic. If there is one shared, dominant, and distinctive historical background to Middle Eastern legal systems, it would vest in the special historical role taken by Islam in the development of the law. Islamic law – the *shari'a* – constitutes the prevailing common historical legal tradition in the region.

#### MIDDLE EASTERN LEGAL CALQUES

Islamic law, however, is a latecomer. If the mere majoritarian fact of present-day populations living in the area is evidence of its

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4. Noel Coulson's *A History of Islamic Law* (Edinburgh 1964), remains the reference most read in English. It is an elegant work but does not convey the huge lacunae in our knowledge of Islamic (and Middle Eastern) law at all stages of its development. See also the criticism on substance by Schacht, "Modernism and traditionalism in a history of Islamic law," 1 *Middle Eastern Studies* 388-400 (1965), esp. 396-99. Schacht himself has transformed his *Esquisse d'une histoire du droit musulman* (Paris 1953), into the first part of his authoritative, but heavy stylistically and historically patchy compendium, *An Introduction to Islamic Law* (Oxford 1964). Schacht's bibliography at 214-85, is an indispensable scholarly tool on Islamic law. It can be supplemented by the following references: L. Zwaini & R. Peters, *A Bibliography of Islamic Law 1980-1993* (Leiden 1994); Makdisi, "Islamic law bibliography," 78 *Law Library Journal* 103-89 (1986); and my own essays mentioned in the previous note.

5. The map at pp.460-61 of Albert Hourani, *A History of the Arab Peoples* (London, 1991), illustrates the 'Middle East' area covered in the present book. Comprehensive histories have donned different titles ('Near East', 'Arab', 'Muslim', 'Islamic') even though they often deal with overlapping geographical objects. Among the most authoritative, in addition to Hourani's magnum opus, stand the recent works of Ira Lapidus, *A History of Islamic Societies*, (Cambridge 1988); Malcolm Yapp, *The Making of the Modern Near East, 1792-1923*, (London 1987); *The Near East Since the First World War* (London 1991); Bernard Lewis, *The Middle East* (London 1995). I have attempted to deal with what I consider the main political problems of the area in *The Middle East into the 21st Century* (Reading 1996), which includes a bibliographical essay on the modern Middle East at pp. 236-47.

centrality, the spread of Islam came last in the history of Middle Eastern civilisations. Its emergence in the early seventh century, at a period which is known in Western scholarship as 'late antiquity', appears both as a radical break with previous legal traditions and as the continuity of Middle Eastern patterns that strike root well into the first civilisations of written documents and persist in some forms to the present.

Illustration of this persistence is not necessarily achieved by reducing the pattern to the monotheistic legacy which is evident in any rough comparison between Biblical<sup>6</sup> – both Christian and Jewish<sup>7</sup> – and Qur'anic legal dispositions: if Jewish *halakha* and Muslim *shari'a* are 'copies conformes', and if the law of talion appears as evident calque in all the monotheistic sacred books,<sup>8</sup> some further distance in history allows the discovery of some striking similarities going back in time as far as early Mesopotamia.<sup>9</sup> In the 282

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6. For an introduction to early Jewish law (Hebrew *halakha*), Raymond Westbrook, "Biblical law," in N.S. Hecht et al. (eds.), *An Introduction to the History and Sources of Jewish Law* 1-17 (Oxford 1996), with further references at 15-17. Note Westbrook's mention of the "wider ancient Near Eastern traditions," and of "general ancient near practices," 2; these themes are further elaborated in the case of Biblical and Mesopotamian law in his *Studies in Biblical and Cuneiform Laws* (Paris 1988). On *halakha* and *shari'a*, the exact equivalent in Islam, studies are fewer than one would expect considering the similarities: see generally Samuel Goitein, "The interplay of Jewish and Islamic laws," in B.S. Jackson (ed.), *Jewish Law in Legal History and the Modern World* 61-77 (Leiden 1980).

7. For comparative work on early Christian and Jewish law, leading work has been conducted by Duncan Derrett (also a specialist of classic and modern Indian law) and David Daube. See e.g., J.D.M. Derrett, *Law in the New Testament* (London 1970); D. Daube, *The New Testament and Rabbinic Judaism* (New York 1973) (rpt of 1959 London edition). For a bibliography of the two scholars, Gunther-Dietz Sontheimer and Parameswara Kota Aithal (eds.), *Indology and the Law: Studies in Honour of Professor M. Derrett* 413-58 (Wiesbaden 1982); E. Bammel, C.K. Barrett & W.D. Davies (eds.), *Donum Gentilicium: New Testament Studies in Honour of David Daube* (Oxford 1978).

8. The concept of calque has been used with effectiveness by John Wansbrough in his *Quranic studies: sources and methods of scriptural interpretation* (Oxford, 1977); and *The Sectarial Milieu: Content and Composition of Islamic Salvation History* (Oxford, 1978). See also my "Readings of the Qur'an in Najaf and London: John Wansbrough and Muhammad Baqir al-Sadr," 57:1 *Bulletin of the School of Oriental and African Studies* 158-73 (1994), and the bibliography of Wansbrough in the same issue of that journal, 4-13. Wansbrough has more recently published a book spanning the diplomatic calques of the Mediterranean over a period of three millennia (1500 BC- 1500 CE), *Lingua franca in the Mediterranean* (London 1996), from which much of the attention in the present study originally derived.

9. For an overview of Mesopotamian law, see chapter 15 on law of the excellent introduction by J. N. Postgate, *Early Mesopotamia: Society and Economy at the Dawn of History* (London 1992); J. Bottéro, "Le 'Code' de Hammurabi," in *Mésopotamie: L'écriture, la raison et les dieux* 191-223 (Paris, 1987) (suggesting the code is in fact a collection of cases, a 'véritable traité de jurisprudence', rather than a code of laws, citation at 223); Emile Szlechter, e.g., "La 'loi' dans la Mésopotamie Ancienne," 12 *Revue Internationale des Droits de l'Antiquité* 55-78 (1965); The most authoritative English study of the Babylonian codes remains G.R. Driver and John Miles, *The Babylonian Laws* (Oxford 1953), 2 vols [hereinafter Driver and Miles]. A French translation, more briefly annotated, was published by André Finet, *Le Code de Hammurapi*

paragraphs of the Code of Hammurabi (ca mid-18th century B.C.), 21 are exclusively devoted to criminal dispositions. The "tooth for a tooth" concept of the Qur'an<sup>10</sup> and the Bible<sup>11</sup> are rendered *verbatim* in the Code: "If someone breaks the tooth of a free man, who is his equal, his tooth will be broken" (§ 200); and "if someone poaches the eye of a free man, his eye will be poached" (§ 196).

In criminal law, the concept of collective responsibility has been the object of some interest in the early history of Islamic law in the discussion of *diyya*, translated as bloodmoney, and *'aqila*, a concept referring to a group of people who are in their livelihood close to the perpetrator of a crime and become legally implicated upon its commitment. The Code of Hammurabi refers to collective responsibility in two ways: the first is connected with compensation, and §§ 22-24 present the case of the responsibility of the 'state' vis-à-vis the group: "If someone has engaged in highway robbery<sup>12</sup> and is caught, this man will be killed. If the robber is not caught, the robbed person will declare his loss in an official way before God; then the God, and the prefect in the territory and under the jurisdiction of whom the robbery has taken place, will compensate him for his loss; If it is a case of murder, the city and the prefect will grant a measure [equivalent to 500 grams] of silver to his family."

The second aspect of collective responsibility relates to the law of evidence, as the criminal relevance of the larger group is established by a collective testimony which, much like Islamic law, depends on the neighborhood: "If someone, whose belonging has not been lost, declares 'I have lost a belonging', and if he invokes his neighborhood, the neighborhood will declare officially, in presence of the God, that his belonging has not disappeared. He must then restitute to his neighborhood double the amount he was asking for." (§ 126)

Both in terms of evidence and in terms of the collective responsibility of the neighborhood for the crime of an individual, these measures are akin to the law of *diyya* ('bloodmoney') and the collective responsibility of the local community in Islam for crimes committed in the neighborhood.<sup>13</sup> It was recently shown that *diyya* was not asso-

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(Paris 1973). Hammurabi himself belongs to a deep-rooted legal tradition, which can be traced by to the 'laws of Eshnunna', elaborated two centuries earlier, Driver and Miles, i, 7: French translation and commentary by E. Szlechter, *Les lois d'Esnuna* (Paris 1954); English by Reuven Yaron, *The Laws of Eshnunna* (Jerusalem-Leiden 1969, 2nd rev. ed. 1988). The *Revue Historique de Droit Français et Etranger* carries a detailed bibliographical survey of "droits antiques," including Mesopotamian laws. There are also extensive bibliographical sections in the *Revue Internationale des Droits de l'Antiquité*, which succeeded the *Archives d'Histoire du Droit Oriental*, 1937-51.

10. Qur'an v: 45.

11. Exodus xxi: 23-25; Leviticus xxiv: 18-20; Deuteronomy xix: 21

12. On highway robbery, to be punished by death, see Qur'an v: 33.

13. Schacht summarizes the issue as follows: "In most cases it is not the culprit himself but his *'aqila* who must pay the blood-money. The payment is made in three

ciated by necessity with Bedouin 'tribal' law, as the concept and operation of "neighborhood responsibility" was also decisive for city dwellers. That it could also cover – and perhaps more typically so – the city is substantiated in early Islamic legal texts with "primary reference to city life".<sup>14</sup>

Much in the sense covered by Hammurabi's "prefect" and "city", the correlation with Mesopotamian neighborhood law is further evidenced by the role, in the Islamic operation of compensation witnessed in texts three millennia later, of "bureaucratic initiative: This is reflected first in the insistence, several times repeated, that all claims for *diyya* payments should be taken before a judge, and that payments should not begin till after a judicial decree to that effect".<sup>15</sup> Conclusions on Islamic criminal law sound similar to those of more ancient systems in the region: "The social reality behind the juristic rules is at least this, that there was no room in Near-Eastern society of this period for the nuclear family or the isolated individual. People lived in, and owed allegiance to, groups, which, in the case of Muslims, were traditionally demarcated by reference to tribal lineage. Whatever other functions these groups served, they certainly provided mutual support in case of non-deliberate injury."<sup>16</sup>

Thus, similar traits which continue to be produced to the present day – where one will recognize the 'collective responsibility' also for deliberate injury –, within or outside city life. The collective dimension remains averse to a personalized "principle of legality" said to have been formally introduced into the Western system by the 18th century Italian jurist Cesare Beccaria.<sup>17</sup> This collective dimension

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yearly instalments, with the provision that each member of the '*aqila*' has to pay not more than 3 or 4 dirhams altogether. If the amount is less than one-twentieth of the blood-money, not the '*aqila*' but the culprit himself must pay. The '*aqila*' consists of those who, as members of the Muslim army, have their names inscribed in the list (*diwan*) and receive pay, provided the culprit belongs to them; alternatively, of the male members of his tribe (if their names are not sufficient, the nearest related tribes are included); alternatively, of the fellow workers in his craft or his confederates; and the '*aqila*' of the client, both in the sense of a manumitted slave and of a convert to Islam, is his patron and the '*aqila*' of his patron. The institution has its roots in the pre-Islamic customary law of the Bedouins, where the culprit could be ransomed from retaliation by his tribe, and the inclusion of confederates and of clientship seems to be ancient Arabian too." Schacht, *Introduction*, 186. See also the legal restatement of Ibrahim al-Halabi (d.956/1549), *Multaqa al-abhur*, on which Schacht bases his treatment, with the commentaries of Shaykhzade, known also as Damad Efendi (d.1087/1676), *Majma' al-anhur*, and Haskafi (d.1088/1677), *Al-durr al-muntaqa*, in the Beirut 1998 four-volume edition, iv, 397-416. See also the entries on '*aqila*' and '*diyya*' in the *Encyclopaedia of Islam*, first and second editions.

14. Norman Calder, *Studies in early Muslim jurisprudence*, Oxford 1993, 204.

15. Calder, *Studies*, 207.

16. Id., 206. See also on '*aqila*', 202-08.

17. C. Beccaria (1738-1794), *Dei delitti e delle pene*, Livourno, 1765: "§iii. Conséquences: La première conséquence de ces principes est que les lois seules peuvent déterminer les peines des délits et que ce pouvoir ne peut résider qu'en la personne du législateur. . . La seconde conséquence est que, si chaque membre individuel est lié à la société, celle-ci est pareillement liée à chacun de ses membres par un contrat qui,

can be summarized in three central staples of a Middle Eastern criminal law pattern: (1) elements of the *lex talionis*, particularly with regard to murder and deliberate infliction of injury; (2) a collective system of evidence and compensation, particularly for manslaughter and non-deliberate injury; and (3) a formalized role for intermediaries, both as city "judges" and tribal "elders". The logic of criminal law in the Near East is as complex as it is ancient, and has proven remarkably persistent to the present.

But the Mesopotamian legal pattern is not simply criminal. Some family law institutions of the Qur'an, which have now become rare or obsolete, can be perhaps better understood with reference to their antecedents in old Jewish and Mesopotamian laws.<sup>18</sup>

Other institutions have remained very much alive. The Code of Hammurabi regulates matrimonial issues in some detail: a list of incestuous relationships is forbidden in strong terms for mother and son and for stepmother and son (§§157, 158). This is much less detailed than in the Qur'an, which is probably indebted more directly to the Bible,<sup>19</sup> but incest and *mahr* (dower) are categories which operate as models following which many Middle Eastern variations have taken place. Hammurabi's law anticipates the Islamic dower-*mahr* in the *tirhatum*, and discusses its regulation in some detail. This Ak-

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du fait de sa nature même, engage les deux parties. . ." For, according to Beccaria, in "§ii. Droit de punir: tout homme se regarde comme le centre de toutes les combinaisons du globe." (French edition, Paris 1991, 63, 65). See on the Beccarian innovation on this score F. Desportes and F. Le Guhénec, *Le nouveau droit pénal*, i, *Droit pénal général* 140-48 (Paris 1994).

18. Now obsolete formula-based divorce categories like *ila'* (Qur'an ii: 226) and *zihar* (Qur'an xxxiii: 4; lxiii: 2), which are traditionally considered as pre-Islamic 'bad' *jahili* practice by the commentators and the jurists, have been traced back by Gerald Hawting to Jewish traditions in the Mishna (legal interpretation of the Talmud compiled by the Jewish scholars ca 200 CE), "*Ila'* and *zihar* in Muslim law," 57 *Bulletin of the School of Oriental and African Studies* 113-25, at 124-25 (1994). A clear formula such as the one used for *zihar* (husband to wife: 'you are to me like my mother's back', meaning you are forbidden for me to approach sexually as my mother is) was not found in the Mesopotamian laws available to me, although both *qadhaf* and the word *zihar* in connection with some formulaic accusation of the husband appear in the 5th century Syro-Roman Code (Art.65 for *qadhaf*, Art. 85 for *zihar*, see *infra* for an extensive discussion of the Code). Under Islamic criminal law, the penalty of eighty lashes attaching to the crime of *qadhaf*, which is the false accusation of unlawful intercourse, finds however a remarkable antecedent in Hammurabi's code: §127: "If a man has caused a finger to be pointed at . . . a married lady and has then not proved what he has said, they shall flog that man before the judges and shall shave his head"; see also §131-2, and the procedural similarities with Islamic-Arab law, as well as the question of who is entitled to bring the charges, and the social dimension of the penalty, Driver & Miles, i, 275-84.

19. Compare Qur'an iv: 23 and Bible, for instance Leviticus xviii: 6-24; xx: 8-21, Deuteronomy xxvii: 22-25. S.D. Ricks, "Kinship bars to marriage in Jewish and Islamic law," in W.M. Brinner & S.D. Ricks (eds.), *Studies in Islamic and Judaic traditions* i, 123-41, 2 vols. (Atlanta 1986-89),.

kadian 'bridal gift' (*tirhatum*)<sup>20</sup> has given room to some controversy on the nature of the marriage contract in Mesopotamian laws: against Koschaker,<sup>21</sup> who identified *tirhatum* as denoting marriage by purchase, with the bride-price constituting the price given to the bride's father for "selling" his daughter,<sup>22</sup> the legal commentary of Drivers and Miles puts the argument on its head,<sup>23</sup> and adds in support of that alternative theory the fact that in modern day, "the Arabs of Palestine emphatically deny that the so-called 'bride-price' (Arab. *Mahr*) is paid or given for the purchase of the bride; they explain it as compensation paid by the bridegroom to her father or family for the loss of her services in the home".<sup>24</sup>

This controversy carries a familiar ring in the assessment of the nature of the marriage contract in Islamic law, with an exact parallel to the Koschaker/ Driver and Miles debate on whether this is a price for sexual 'rights' of the husband over the wife, or whether it is an altogether separate institution.<sup>25</sup> Even though the controversy may have been mooted in the modern age, as *mahr* is increasingly associ-

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20. Also referred to as *nudunnûm*, or *seriktum*, see Driver and Miles, examples at i, 254 and 256 for *nudunnûm* in Babylonian marriage contracts. In Hammurabi's code, §§ 159 ff.

21. Paul Koschaker, early German specialist of Hammurabi's Code, and editor of volumes 2-6 of its 6 vol. German edition, *Hammurabi's Gesetz*, Leipzig 1904-23. See also his *Rechtsvergleichende Studien zur Gesetzgebung Hammurabis: Königs von Babylon* (Leipzig 1917).

22. German *Brautpreis*.

23. "The whole theory of Babylonian marriage as a system of marriage by purchase indeed rests on the identification of the *tirhatum* with the bride-price, and the advocates of this theory seem to have been led astray by the anthropologists who are somewhat inclined to assume that any practice in use amongst primitive people represents a necessary stage in the development of all civilised races. As already shown, however, the *tirhatum* has nothing to do with sale, and it ought to mean something connected with or given in connexion with the sexual act, to which it refers. It is therefore far more probable that its meaning is a marriage-gift or a gift given to secure a marriage with a view to procreation than that it means a price by which a bride is purchased. It is no argument to say that the word must mean 'price' because the father gets something of monetary value when he gives his daughter in marriage, since in a general sense every contract is based on a consideration of such value. Again, it is not an argument to show that if the *tirhatum* is assumed to mean 'bride-price', a consistent account can be given of Babylonian marriage, since in fact an equally consistent account is obtained if it means a marriage-gift. It appears then that there was no signification of sale in any of the terms connected with marriage and that there was no such idea in the minds of the Babylonian scribes. The burden of proof that the *tirhatum* was a bride-price must then be on those who advance this theory, and it is submitted that they have so far failed to discharge this requirement. Although in Babylonian marriage the father gets some payment for giving his daughter in marriage, he can be said to sell her only in a figurative sense, just as at this day a father is occasionally said to sell his daughter or a woman is said to sell herself to a man; only to this extent is it normally correct to speak of marriage by purchase at Babylon in the time of Hammurabi." Driver & Miles, i, 264-65. (footnotes omitted)

24. Id., 256 fn 1.

25. The parallel to the Koschaker/Driver and Miles debate on the nature of the marriage contract, including bride-price, can be found in S. Haeri, "Divorce in contemporary Iran: a male prerogative in self-will," in C. Mallat & J. Connors (eds.), *Islamic Family Law* 55-69 (London 1990).

ated with the woman receiving it, rather than her guardian, the question has been transposed to a lateral argument over the wife "selling her body" for the *mahr*. The debate, judging by some recent rebounds in the field of family law, appears as relevant as it may have been once over the Mesopotamian nature of the marriage contract.<sup>26</sup>

Turning to commercial law, the Islamic *commenda* contract<sup>27</sup> can also be found in Hammurabi, who first defines partnership<sup>28</sup> in § U of the Code: "If a man has given silver to a man for a partnership, they shall divide the profit or the loss which there may be in proportion before a god". The concept is similar to the one to be found in Islamic law, and is developed at §§ 100-103. "The Babylonian 'partnership' (Bab. *tappûtum*), as it is commonly translated, is not the ordinary partnership of English law where persons become partners in some business for a long term of years. It is a *societas unius rei*, a joint adventure for the carrying out of some particular piece of business, e.g. for a definite 'commercial journey'".<sup>29</sup> Anyone who is familiar with the difficult dissociation, despite the statutes, between personal and corporate liability in the modern Middle East – and most strikingly in the practice of the Arab Gulf States –<sup>30</sup> understands the

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26. Thus Haeri, who notes Murtaza Mutahhari's "vehement objection to the conceptualisation of marriage as a contract of sale, and of women as an object," while she herself reads the classical tradition to carry the "underlying assumption" that "as 'purchasers' in a contract of marriage, men are 'in charge' of their wives because they pay for them." Id., at 58 and footnotes 13 and 14. Ayat Allah Mutahhari was one of the foremost theoreticians of the Islamic Revolution in Iran, and the author of *Nizam-i huquq-i zan dar Islam* (Legal rights of women in Islam) (Qum 1974). He was assassinated in May 1979.

27. *mudaraba*.

28. *tappûtum*.

29. Driver and Miles, i, 187; ii, tr. at 43. The comparison stops however at the recovery by the owner of capital of the sum advanced to his agent. In Mesopotamian law, the loss of capital goes uncompensated to the partner by his agent only in case "an enemy causes him to jettison anything that he is carrying" (§ V. 103). Otherwise, "he shall repay the total amount of the silver [capital] to the merchant" (§ 102). It is interesting to note that the commentators have found the difference between §§ 102 and 103 in Hammurabi's Code difficult to understand: "In §102 the *bitiqtum* is caused by the perils of the journey, and he must repay only the actual debt; but if the loss is caused by the king's enemies, as in §103, he can exculpate himself by oath and is excused repayment. The reason for the distinction between the penalties in §102 and §103 is not easy to discover; for in both cases the money has been lost through *force majeure*." Driver and Miles, i, 194. In contrast to the Islamic (and Judeo-Christian) tradition, "interest" on transactions seems to be commonly authorised in Mesopotamian laws, see e.g. Piotr Steinkeller, "The renting of fields in early Mesopotamia and the development of the concept of 'interest' in Sumerian," 24 *Journal of the Economic and Social History of the Orient* 113-45 (1981). However, the concept for interest is related by Piotrkeller (at 145) to an Akkadian word meaning "to bring an addition, to add. . . Accordingly, the approximate translation of *kud-ra*. . . would be 'to add a portion' (of loan/produce)", which is the exact semantic equivalent to the Qur'an-prohibited *riba*. *Riba* means etymologically 'addition, increase'. Generally on commercial law in Mesopotamia, see W.F. Leeman, *Foreign trade in the Old Babylonian period* (Leiden 1960).

30. See the development of this argument in my "Commercial law in the Middle East: between classical transactions and modern business," 48 *Am. J. Comp. L.* 81-



prevalence of the full liability of the two parties who are partners in the *commenda/ mudaraba/ tappûtum* "joint adventure" over the separate juristic person and the limited liability of a Western-style partnership/ *société/ Gesellschaft*.

*Muzara'a* and *musaqat*, the agricultural equivalents to *mudaraba* under Islamic law, could also be expected to have calques in Hammurabi's Code, where the relationship of owner of land and its worker – divided as in Islamic law between usual crops and orchards – is developed at length in §§ 42-56.<sup>31</sup> Like Islamic law, distinction between slaves and free men, as well as variations of degrees of freedom, are also frequently made.<sup>32</sup>

*Mutatis mutandis*, historical comparisons show repetitions of eminently similar legal institutions across the centuries: whether in family law, commercial and crop sharing contracts, or the law of talion and collective responsibility for crimes, continuity is patent to date across Middle Eastern jurisdictions, from Saudi Arabia to Morocco and Israel.<sup>33</sup> Yet, and for a host of reasons, too little scholarship stretches over more than one discipline or area. Following pioneering work which starts where most comparative scholarship involving Islamic law had stopped in the 1930s, some imagination is needed to

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141 (2000), and the brief comparison of the classical models with the modern 'joint venture' in Mallat, "Joint ventures," in R. Naser & T. Kashishian (eds.), *Lebanon and Europe: Forging New Partnerships* 29-37 (Beirut 1998).

31. §42. "If a man has taken up a field for cultivation and then has not raised corn on the field, they shall convict him of not having done the (necessary) work on the field and he shall give corn corresponding to (the crops raised by) his neighbours to the owner of the field."

§43. "If he has not cultivated the field but leaves (it) waste, he shall give corn correspondingly to (the crops raised by) his neighbours to the owner of the field and shall plough the field, which he has left waste (and) harrow (it), and he shall render (it) to the owner of the field". The method of assessment is an average in the amount of harvest which is common to a region, according to which the cultivator will give the owner of the land a share in the produce: "The subject of §§42-3 is the failure of a cultivator to raise a crop on a field which 'he has taken over' (Bab. *usêsi*) under a contract with its owner 'for cultivation' (Bab. *ana irrisutim*), presumably for one year. ... It may be added that this method of assessment still survives in the country [Iraq]." In the footnote to the concept of *usêsi*, Driver and Miles further add: "How a verb meaning 'to make to go forth, bring out' (Bab. *sûsû*) can have acquired this special connotation is obscure; but it may be suggested that the underlying idea is that the farmer takes the property out of the owner's hands or control for the purpose of carrying out the work which he undertakes to do under the contract. The relation between them is, then, that of parties to the contract, not that of landlord and tenant in English law." i, 136-137. The *muzara'a* model which reproduces §42 of Hammurabi's code was until recent years widely used in the Middle East. For an example of a "method of assessment" like the one mentioned above, see the example of land legislation in Iran in the 1980s in my *The renewal of Islamic law* (Cambridge 1993), 149ff.

32. This is common in all slave-based economies, but the recurrence of degrees in an individual's 'freedom-based value' is striking in Islamic and Babylonian law.

33. Including, in modern Israel, religious-based law, see e.g. Itzhak England, *Religious law in the Israel legal system* (Jerusalem, 1975); *Jewish law in ancient and modern Israel: selected essays*, with an introduction by Haim H. Cohn, (New York 1971). See also infra nn. 211-16, and n.512 and accompanying texts.

help the discipline open up to the enriching concept of a Middle East legal pattern.<sup>34</sup>

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Among many an episode which have remained unstudied despite a remarkably close historical calque, stands the fifth century CE Syro-Roman Law Book. Since its publication and translation in 1880, this code has lain dormant in the exclusive scholarship of Syriac specialists. Yet the Syro-Roman book points out to deep Middle Eastern legal patterns which enlighten several features of Islamic family law. These similarities were generally ignored in the internal Islamic scholarly tradition, which, similar in this to any 'new' religion, is hardly prepared to acknowledge external "debts": "Any law other than the law of Islam is obsolete", says one famous compendium of diplomatica in classical Islam.<sup>35</sup> This is echoed by the jurists: "All laws have been superseded by the law of the Prophet."<sup>36</sup>

While this resistance comes in the natural order of things when great religions are in play, it is less understandable why the search

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34. The argument for bolder, more 'imaginative' comparative work is made in Patricia Crone, *Roman, provincial and Islamic law: the origins of the Islamic patronate* (Cambridge 1987), chapter 1, 1-18. There is a famous short note by Joseph Schacht, in 1927, on calques in the law of sale passing from Babylon to Islam. According to him, they both share, unlike other legal systems, the meeting of offer and acceptance as constitutive of contract. But the rapprochement was never seriously developed or substantiated. See an English translation as Schacht, "From Babylonian to Islamic law," in *Yearbook of Islamic and Middle Eastern Law* i, 29-33 (1994). (Original in *8 Orientalistisches Literaturzeitschrift* 664-69 (1927)).

35. Ahmad ibn 'Abd Allah al-Qalqashandi (d.821/1418), *Subh al-a'sha*, Cairo, 14 vols., 1913-1918, xiv, 324: "*kullu shari'a siwaha dathira*". For a more general appreciation of past civilisations by Muslim historians and poets in the classical age, see Roy Mottahedeh, "Some Islamic views of the pre-Islamic past," 1 *Harv. Middle Eastern and Islamic Rev.* 17-26 (1994). On the mysteries of the Pyramids and of the Sphinx in medieval Egypt, a beautiful text of al-Idrisi (d.649/1251) was published by Ulrich Haarman, also the author of "Die Sphinx. Synkretistische Volksreligiosität im spätmittelalterlichen islamischen Ägypten," 29 *Saeculum* 367-84 (1978). The text of Idrisi is not legal, and he hesitates between awe before the pyramids and their civilisation ("For all things on earth, save the pyramids, I fear time. For time I fear the pyramids," 85) and the great silence its mute talismans carry: "On the pyramids are all kinds of writings in the pen of previous nations and defunct kingdoms, and no one knows what the writing is or means. . . The nation that built it lay destroyed, it has no successor to carry the truth of its stories from father to son, as sons of other nations carry from their fathers what they love and cherish among their stories." 93, 105. Al-Idrisi, *Anwar 'uli al-ajram fil-kashf 'an asrar al-ahram*, in U. Haarman (ed.), *Das Pyramidenbuch des Abu Ja'far al-Idrisi* (Beirut 1991). There is an important but generally inconclusive debate on the debt of Islamic law to other legal systems, see Joseph Schacht, "Foreign elements in ancient Islamic law," 3-4 *J. Comp. L.* 9-16 (1950); Calder, *Studies*, 208-14.

36. *jami' al-shara'e' nusikhat bi-shari'at al-nabi*, Taqi al-Din al-Subki (d.756/1355), *Fatawa*, Beirut, 2 vols, 1992, ii, 370, in a long discussion over a dispute on the right of Christians to build churches.

for transreligious legal patterns has also been remarkably absent from the analysis of western authors.<sup>37</sup>

Yet the 130 articles in the Arabic version of the Syro-Roman Code sound so familiar to the modern Arab lawyer that the Code appears as some "vulgate" for the uninitiated. In comparison with early books on Islamic succession in the tradition of *fiqh*, the layout of that Christian code is clear, and its phraseology in comparison simple.<sup>38</sup> Even from a practitioner's perspective, this is an important book in terms of the wording and structure of basic rules in such a specialized area as the law of succession.

For the lawyer, most striking in the Arabic version of the Syro-Roman Code is the terminology, starting in the opening words with the use of the Arab-Islamic word *sunna* as law.<sup>39</sup> The code develops then the intestate and testate succession scheme, some of which "belongs on the whole to Roman law,"<sup>40</sup> but some of which is better identified as a mixture of legal patterns.<sup>41</sup>

Several elements in Roman Provincial law appear to be calques for the Islamic law of succession. It is well known to inheritance law practitioners in the Muslim world that the key concept in the system of succession is operated by the principle of the agnatic line – the '*asaba* – complementing distribution to "Qur'anic heirs" of parts of the deceased's estate. While some of the shares in the succession are prescribed to a limited number of heirs defined in the Qur'an (includ-

37. Exceptions include in addition to P. Crone, H. Kaufhold, *Syrische Texte zum Islamischen Recht* (Munich, 1971); "Über die Entstehung der Syrischen Texte zum Islamischen Recht," 69 *Oriens Christianus* 54-72 (1985). Crone and Kaufhold continue the interrupted tradition of the great Italian scholar C. Nallino, *Raccolta di scritti editi e inediti*, Vol. iv: *Diritto musulmano e diritti orientali cristiani* (Rome, 1942). Except for some interface in recent Byzantine studies, works like those of Peter Brown on late antiquity have remained opaque to Islamic studies, and vice-versa. The books of Patricia Crone and 'Irfan Shahid offer an exception of sorts.

38. The earliest extant book on the Islamic law of succession is much less organised and much less comprehensive than the Syro-Roman Code. Text published by Hans-Peter Raddatz, "Frühislamisches Erbrecht nach dem *Kitab al-Fara'id* des Sufyan at-Thawri, Edition und Kommentar," 13 *Die Welt des Islams* 26-78 (1971).

39. "*Jami' al-sunan al-hasana wal-hudud al-mahmuda*, collection of all the good laws (*sunan*, plural of *sunna*) and penalties (*hudud*, plural of *hadd*)" of King Constantine, Theodosius and Laon's, in the introduction to *Syrisch-Römisches Rechtsbuch aus dem fünften Jahrhundert*, edited, translated and annotated by Karl Georg Bruns und Eduard Sachau, Aalen 1961 (rpt of Leipzig 1880), text in Syriac (three versions), Arabic and Armenian. (Hereinafter *Syro-Roman Code*).

40. Bruns, in *Syro-Roman Code*, 303-16.

41. "Im allgemeinen sind es hauptsächlich folgende vier Principien, von denen es beherrscht wird:

1. Eine Parentelenordnung von drei Parentelen, wie im Mosaischen Rechte.
2. Ein Vorzug der Agnaten von den Cognaten, wie im römischen Rechte. [Sunni law]
3. Ein Vorzug der väterlichen Cognaten vor den mütterlichen, wie in keinem der beiden Rechte. [this is actually typically Muslim Sunni, as will be developed anon.]
4. Ein Vorzug der Männer vor den Weibern, mit ausnahme der Töchter und Schwestern, wie im römischem Rechte, aber mit subsidiärer Berechtigung der letzteren, die dem Römischen Rechte wieder fremd ist. [Again to be found in Sunni law]" Id., 306.

ing the four closest female relatives: the wife, daughter, mother and sister), the succession is usually not exhausted. The chief characteristic of the system is that once these prescribed Qur'anic shares are distributed, the nearest agnatic male kin receives the remainder of the succession to the exclusion of closer female relatives of the deceased. This male residuary line is known as the '*asaba*.'

As a matter of fact, the '*asaba*' system dominates succession law principles in the Syro-Roman Code of fifth century Syria, and the *ab intestat* succession in the Syro-Roman code can be pointedly compared to Islamic law in that specific principle: the following passage, taken from the very first article of the Syro-Roman Code, can equally serve as a good summary of the scheme of succession in Muslim Sunni law: "If a person dies without a will, . . . and is not survived by his father or his mother or by a child or a brother, then his estate goes to his paternal uncles or the sons of his uncles. . ."

A few sections later, the word '*asaba*' itself appears: "Article 19: If a man has sons who all die before him without children of their own, and if he has daughters who are married and who gave birth to sons and then died; if he has a brother and chose to write a will in favor of his brother and to allow his household to inherit this is permissible, he can do as he pleaseth; but if he dies without a will, then his inheritance goes to his brothers and to the sons of his brothers. If he does not have a brother, then his inheritance goes to his paternal uncles and their sons. Only if the family (tribe) of his brother has all been exhausted will the sons of his daughters inherit, and if his daughters had no sons, the sons of his sisters inherit and in all the '*asaba*' men inherit and not women, and if males are exhausted only then will women from his '*asaba*' inherit."

Thus article 19 of the Syro-Roman book lays out *ab intestat* rules which, in form and substance, appear surprisingly familiar to an Islamic lawyer. From a historical perspective, the most striking feature in the system is that the word '*asaba*' does not appear in the Qur'an, despite its key importance for the calculation of the succession. Without that pervasive concept, it is simply not possible to understand the mere basics of succession law in Sunni Islam. For example, if a man dies leaving his wife and a distant cousin on the male side of the family, the widow gets 1/4 and the cousin the remaining 3/4. This is because the share of the wife is stipulated in the Qur'an, and the rest goes under the Sunni rules of succession to the nearest agnatic male kin, the '*asaba*'.<sup>42</sup> Nor should the system be reduced to extreme instances. In the case of a man (or a woman) who dies leaving one daughter and a paternal uncle, the daughter receives

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42. The widow gets 1/8 if her husband dies and leaves children. Qur'an iv: 12.

1/2 under the scheme laid out in the Qur'an, and the remaining half goes to the distant male relative on the agnatic side.<sup>43</sup>

This scheme is typically Sunni. It is not shared by all Muslims, and the Shi'is, the other most important group in the Islamic world,<sup>44</sup> do not recognize the *'asaba*. In the previous example - surviving daughter, paternal uncle -, the daughter receives under Shi'i law the whole succession. The paternal uncle is excluded by her closer kinship to the deceased.

This deep difference in one of the more intimate points of convergence between property law and family law is explained, within the Islamic tradition, as a dispute over Qur'anic interpretation as qualified by the sayings of the Prophet Muhammad, the *hadith*. For the Shi'is, that particular saying is not admitted, and since there is no instance of *'asaba* in the text of the Qur'an, there is no need to extrapolate in the way the Sunnis have done over the centuries.

While the dispute within the Islamic tradition is both textual and political,<sup>45</sup> another possible explanation of this radical difference between Sunni and Shi'i succession may be more alluring for the genealogy of the Islamic law of succession than the one usually received. The new formulation is based on a comparison between the Persian Zoroastrian legal tradition, namely the *Matiyan-i hazar dadistan*,<sup>46</sup> and the Shi'i rules of succession. They are similar in many ways. This is how the Sasanian rules are summarized: "There was no right of

43. Further illustrations:

—If the deceased has two daughters and a paternal uncle, the two daughters receive 2/3 of the estate, and the uncle the remaining 1/3. The paternal uncle is the *'asaba*, the nearest male kin. A maternal uncle would receive nothing.

—If a woman dies leaving her husband, a son and a daughter, the husband receives 1/4, the daughter and the son receive the remaining 3/4, with the son receiving twice the share of his sister (it is said in this case that the presence of the son makes a *'asaba* of his sister, and they receive the remainder as joint *'asaba*, except that the other principle of the son receiving twice the share of the daughter also applies, following Qur'an iv: 11).

—If a woman dies leaving her husband, a daughter and no son, then the husband gets 1/4 (he is not a *'asaba* as he is not a male blood kin and so receives his Qur'anic share in the presence of a child, Qur'an iv: 12), the daughter gets 1/2 (Qur'an iv: 11) and the remainder (1/4) goes to the closest male kin, which may be a paternal uncle, or a paternal cousin, who is then the *'asaba*.

44. Shi'ism commands some 120 to 150 million followers in Iran, Pakistan, India, Iraq and Lebanon, and represents the most important section of the Muslim population in the world after the Sunnis. The Muslim population in the world is estimated at ca one to 1.2 billion people, of which over 80% is Sunni.

45. See next section for the political illustration.

46. This is the main source of Zoroastrian law, "the Lawbook of 1000 decisions," part 1 edited by J.J. Modi, Poona 1901; part 2 edited by T.D. Anklesaria, Bombay 1913. A survey of pre-Islamic Sasanian law in Iran was published by A. Perikhanian, "Iranian society and law," in the *Cambridge History of Iran*, 3:2, *The Seleucid Parthian and Sasanian periods* (Cambridge 1970), chapter 18, at 627-80. The following was originally inspired by Bodil Hjerrild, "Islamic law and Sasanian law," in Christopher Toll & Jakob Skovgaard-Petersen (eds.), *Law and the Islamic world: past and present* 49-55 (Copenhagen 1995).

primogeniture, every son inherited an equal share, the principal wife the same as a son, and daughters half of this share. There is no evidence of other relatives inheriting",<sup>47</sup> as indeed there was no concept of *'asaba*. From there follows "the important role" played by women in the succession scheme of ancient Iranian tradition and their continuation as Shi'i law:

The Qur'anic rules about wives' and daughters' right to inherit were on Arabic soil a new phenomenon which gave the women advantages which they had not known hitherto. In Iran, however, it was a matter of course that women inherited, and that succession might be carried on through them; thus the Sunni version of Islamic law meant a step backwards for the Iranian women. . . . The Sunnites maintained that the successor should be found amongst the agnatic relatives, while the Shi'ites asserted that the succession had to go through Muhammad's daughter Fatimah and her husband to their sons and their descendants. The Sunni point of view reflects the patriarchal, patrilinear system which aimed at keeping the possessions and power within the tribe by its emphasis on the male agnatic heirs. The Shi'ites were not so much concerned with tribes as with families. In their view, the direct descendants of Muhammad through Fatimah were the legitimate successors of the Prophet, and in Sasanian terminology she would have been *ayoken*, daughter, 'Ali *stur*, i.e. intermediary successor. I propose that their viewpoint reflects the traditional succession law which they had followed for centuries.<sup>48</sup>

While too tight a comparison might lead to excessive conclusions,<sup>49</sup> it is striking to see the Islamic system of inheritance as a prolongation, on the Sunni side, of the Syro-roman 'western' tradition, and for the Shi'is, whose demographic strength remains to date concentrated in the eastern fringe of the Arab world, as a calque deriving without discontinuation from the Persian Zoroastrian legal tradition.

One possible conclusion is that the historical schism between Sunni and Shi'i rules of succession has a much deeper pedigree hailing, in the Sunni case, from Roman Provincial law as illustrated in the Syro-Roman Code; and, for the Shi'is, from a Persian Zoroastrian tradition. That the divide rests on a specific family and social substratum which is peculiar to each of the two large Muslim communities would be difficult to prove. What is beyond doubt is that the

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47. Hjerrild, "Islamic law and Sasanian law," 52.

48. Id. at 52-53.

49. For instance: "The Shi'ites did not form their succession law on the basis of the example they set by choosing 'Ali and his sons as successors. On the contrary: they chose 'Ali and his sons as successors and interpreted the Qur'anic inheritance laws according to their former traditions." Id. at 53.

millennia-old differences correspond, in the contemporary Muslim world, to a geographic continuum across the Persian/ Arab/ Turkish worlds, and one could be tempted to ascribe a civilizational depth to such calques on the basis of the available textual evidence.

Dating, however, remains a problem, which can be illustrated in a posthumous note of the Italian legal historian Carlo Nallino. Article one of the Christian fifth century Syro-Roman code ends in the extant manuscripts, but one, on a statement of equality between male and female in the apportionment of inheritance:

The first words of the first paragraph of the Syro-Roman book are the following: 'if a man dies without writing a will and leaves behind male and female children, they will inherit equally'. But instead of stopping there, like the other Syriac manuscripts and like the Arabic and Armenian versions, the Parisian manuscript *P*, written in 1238-39 by a Syrian Jacobite from 'the province of Syria', continues as follows: . . . 'From the estate of the deceased, while the male receives two shares, the female only receives one share.'<sup>50</sup>

In other words, the Paris manuscript of the Syro-Roman Code introduces in the later version, some seven centuries after the original pre-Islamic text, the important qualification of a double share of the inheritance for the male against one share for the female. Nallino insists in his commentary that the qualification could *not* have been an oversight of the copyist,<sup>51</sup> and discusses the controversy over the origins of this "interpolazione del copista" which raged among specialists of Syriac sources at the turn of the century. "The conclusions", he writes, "are not decisive,"<sup>52</sup> but the origins of the qualification is according to him Muslim, "origine che è ormai assoluta certezza."<sup>53</sup>

The consequences of this small addendum are twofold: first the difficulty of dating texts illustrates a more fundamental complexity which arises, as in this case, from the copyists' 'creative editing'. By simply adding one sentence, the 1238 Jacobite copyist may have introduced a central Islamic rule to the Christian law of succession which governs Near East Christians, namely that sons are entitled to double their sisters' share of succession. More significantly, this rule, as we shall see in a moment, became law in most of the Orient until the 20th century, and continues to date for significant sections of

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50. Nallino, *Raccolta*, iv, 489-500 ("Appendice (inedita): L'interpolazione di *P* 1"), at 489-90: "Le prime parole del primo paragrafo del Libro siro-romano sono, in tutti i manoscritti, le seguenti: 'Si mortuus est vir et non scripsit testamentum et reliquit filios mares et feminas, heridant aequaliter'. Invece di fermarsi a questo punto, come gli altri mss. siriaci et come le versioni araba et aramena, il codice parigini *P*, scritto nel 1238-39 da un Siro Giacobita nella 'provincia di Siria', così continua: . . . 'bona eius, cum accipiat mares partes duas, feminae vero unam ex tribus partibus'". (at 489-90)

51. Id. at 490.

52. Id. at 499.

53. Id., 500. All footnotes omitted.

Middle East Christians. But it may simply be that, by the thirteenth century, that rule was so well ensconced in practice that the copyist did not see any problem in 'correcting' the earlier text. From that perspective, Islamic law operates as a 'corrector' of Christian law, while Christian law in the Syro-Roman code is a clear 'model' for a dominant Islamic law system of succession in the Middle East. The question of influence becomes a two-fold process, in which historical antecedence loses its importance in favor of some form on a 'Middle Eastern common law'.

We therefore need to revise our view of Islamic law in the light of the pre- and post- Islamic Christian tradition in the Levant, and seriously consider close resemblances in substance and form across religions and eras in favor of an identifiable, common Middle Eastern legal *koine*. This can be further illustrated in a much later Christian reproduction of the 'Islamic' rule of 'the two shares for the son for one share for the daughter.'<sup>54</sup>

The legal calque occurs in a collection of Christian laws of the Eastern Maronite Church, written by the Bishop of Beirut 'Abdallah Qara'ali (d. 1154/1742). Qara'ali's code was entitled *Mukhtasar al-shari'a* (summary of the [Christian Maronite] *shari'a*) and was modeled after the Coptic compendium of Ibn al-'Assal (9th/13th century), "which Qara'ali summarized some times, and contradicted rarely, in order to follow usage or what has entered into practice from Islamic law".<sup>55</sup> Ibn al-'Assal is well established as a major point of reference in a continuum of Christian law which extends from Ethiopia's classical texts to the farthest Northern tip of Arab Christendom. The *Mukhtasar* of 1720 is a direct successor of Ibn al-'Assal's Nomocanon, which itself incorporates verbatim passages from the Syro-Roman Code.

More than ten centuries after the Syro-Roman Code, and eight centuries after the Qur'anic revelation, Qara'ali's "code" remains extremely close to the ab intestat succession of the Sunni system. "The wife inherits one-fourth of the estate in the absence of children. . . and one-eighth with children."<sup>56</sup> The surviving husband's share is respectively one-half and one-quarter. Other calques include the principle of the daughter's half share of her brother<sup>57</sup> and the various '*asaba* as the residuary heirs with the fixed heirs of Islamic law.'<sup>58</sup> On the whole, whether for family law or more generally civil and criminal law, Qara'ali's system belongs to common legal patterns of the

54. The formula appears twice in the Qur'an, iv: 11; iv: 176: "To the male twice the share of the female, *wa lidh-dhakar mithlu hazz al-unthayayn*."

55. Introduction by Bulos Mas'ad to 'Abdallah Qara'ali, *Mukhtasar al-shari'a* 11 (Beirut 1959).

56. Qara'ali, *Mukhtasar al-shari'a*, 131.

57. Id. at 132.

58. Id., 'Qur'anic' heirs, *ashab al-furud*.



Middle East.<sup>59</sup> While continuity is hard to prove because of the wide historical gaps between extant texts, parallels in substance, syntax and terminology are striking.

It is in the context of common legal patterns shared within the Middle East between Islamic and Christian traditions that the Maronite Patriarch Yusuf Hubaysh's remarks in 1826 on his predecessor's *Mukhtasar* are revealing. There he recommended abandoning the prevailing rules of Islamic succession law since they guarantee a portion of the estate to the daughter: "It is imperative to return the rules of inheritance of daughters and women to the former usage, meaning that they do not inherit in the presence of males, and are only given their dower. . . The judges, who presently follow everything in the [Maronite] mountain on the basis of the Islamic laws, [stand against the tradition]. . ." <sup>60</sup> In our tradition, the good bishop explains, girls should not inherit anything.

Nor is common legal language limited to the law of succession. In the Syro-Roman Code, frequent are words such as *kharaj* for land tax (Art.31, 109), *qadhif* for false accusation (Art.5, 66, 108), *mahr* for dower (e.g. Arts 38, 43, 44, 69 etc.) and the whole matrimonial law panoply of concepts (*talaq*, *sadaq*, *nikah*),<sup>61</sup> which appear as a calque of an Islamic tradition persisting to the present day, alongside the terminology of abandoned practices relating to slavery, where the classical Islamic lawyer would find the full range of familiar legal concepts and, as demonstrated in the case of the rights of manumission,<sup>62</sup> similar substantive rules and regulations. One can even find such nuances as established in the current laws on guardianship in the Middle East. For the Christian Syro-Roman code, a young woman is under the tutelage of the guardian (*wasi*) until she is 12, when she

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59. These should probably include also the Coptic tradition, whose most famous classical jurist is Ibn al-'Assal, author of *al-Majmu' al-safawi*, a compilation of laws which he completed in Coptic calendar year 955, equivalent to 637/1239. The standard edition of this Nomocanon was published by Jirjis Filothaus 'Awad in Cairo in 1908. The wills and inheritance section can be found at 335-44 and 344-59. The principle of *'asaba* is recognised as "the precedence of the tribe of the father over that of the mother, *taqdim qabilat al-ab 'ala qabilat al-umm*," at 347. One should also look beyond, to the old Egyptian Pharaonic patterns in the West and the Sasanid empire in the East, and to the Greek and Aramaic laws of the Orient, a vast research if any. The Christian legal tradition itself carries a commonalty of patterns which is easily recognisable in the explicit borrowings made by one Nomocanon to another, for instance those of Qara'ali and Ibn al-'Assal; and the Maronite *Kitab al-huda*, which incorporates two full chapters culled straight off the Syro-Roman book. Joubair, *Kitab al-huda*, 157-59. *Kitab al-huda* is generally dated from the 5th/11th century.

60. Letter of the Patriarch Hubaysh dated 29 September 1826, reproduced in id., p.25-26. The full text is of great interest both to the sociology and law of the Middle East juridical *koine*. See also Ibrahim Najjar, "Le droit de la famille au Liban au xviiième et xixème siècles: Contribution à l'étude du droit des non-musulmans sous l'Empire Ottoman," 40 *Proche-Orient Etudes Juridiques* (Beirut) 9-30 (1987).

61. Respectively repudiation, dower (*sadaq* and *mahr* are equivalent), marriage.

62. *wala'*, discussed in Crone, *Roman, provincial and Islamic law*, chapters 3 and 7, 35-42, 77-88.

passes under the control of another guardian defined in the text as *wali*, a word that also connotes guardianship. The upshot is that, in the latter case, she would be entitled to dispose of her property by will. The distinction between guardianship of the *wasi* and the guardianship of the *wali* is a feature of Islamic law to the present, as can be seen in the different legal operations of the two categories in the field of education and custody.<sup>63</sup>

A final word on the value of comparative exercises in search of Middle East legal patterns – however relative considering the difficulty of assessing genealogies of texts and translations –,<sup>64</sup> derives from the emergence, in the text of the Syro-Roman book, of an unexpected feature of the law of marriage.

It has recently been pointed out that “one of the fundamental innovations of the early Church was the abolition of an ancient, venerable institution – divorce, the practice of which was as widespread as marriage itself.”<sup>65</sup> On the basis of documents from the collection of the Dead Sea Scrolls, the rejection of divorce as hitherto “legal precedent” over millennia is suggested to have been introduced to the early Church by the Essenes – the Qumran or Dead Sea sect. “It is no coincidence that the basis for a divorce-free Church can be found in the Sectarian literature of the Dead Sea Scrolls, since it suggests that the Essenes or other groups on the fringe of Hellenistic Judaism influenced the early formulation of Christian doctrine”.<sup>66</sup>

Interesting on its own as this finding may be, it is the more valuable in the context of a Syro-Roman Code where divorce initiated by either side is discussed at length, both in terms of unilateral repudia-

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63. See examples under the section on custody in our study on family law, “The search for equality in Middle Eastern family law”, *al-Abath* 7-65, 2001 (hereinafter, family law).

64. The specialists vary in their dating of the Syro-Roman Code between the fourth and the eighth century ! Nallino emits the possibility that “the nucleus of the original Greek” (?) might have gone back as early as 312-37 (“Sul libro siro-romano e sul presunto diritto siriano”, *Raccolta* iv, 513-84, at 525); whilst Bruns and Sachau put the date squarely at 476. A more recent study wonders whether Theodosius, Leon and Constantine which are mentioned in the preface of the Code were not those who reigned between 716 and 775. See Joubair, *Kitab al-huda*, 158 n. 1: “Toute la question mérite un examen plus approfondi.”

65. M. J. Geller, “Early christianity and the Dead Sea Scrolls,” 57 *Bulletin of the School of Oriental and African Studies* 82-86 (1994).

66. Id., 85. There is a large literature on the Dead Sea Scrolls. The interested reader can start with Geza Vermes, *The Dead Sea Scrolls in English* (London, 4th ed. 1995). (originally published in 1962), which includes, on law, ‘the Community rule’, 69-94 (rules on joining the community of Essenes, abiding with its Covenant [presumably Biblical], the Master’s role and the organisation of the sect); ‘the Damascus document’, 95-119, including fragments of a penal code, 115-16, ‘the statutes’ on various rituals, Sabbath organisation and choice of judges, 106-13; rules of war, 123-50; ‘The temple scroll’, including various laws on apostasy and rituals, 151-80; commentaries on Biblical law, 357-59. The original scrolls are in Hebrew or Aramaic and are dated between 220 BCE and 70 CE, but the dominant language, like the Bible and the Qur’an, is hardly ‘legal’.

tion of the husband "without harm done" (Art.51),<sup>67</sup> and in case of harm by the husband to the wife or vice-versa: "If the wife wants to separate from her husband or the husband separate from his wife, let the one who asks for separation send a letter of divorce<sup>68</sup> in which he or she explains his/her wishes. If the harm<sup>69</sup> is dealt by the husband, he must give his wife her dower and dowry.<sup>70</sup> If the woman is responsible for the harm, she only gets her dower and the husband retains her dowry as compensation for the injury." (Art.44)<sup>71</sup>

The Christian Syro-Roman book, therefore, does not seem to mind an otherwise banned Christian tradition such as divorce. In historical perspective, it is well known that divorce for followers of the Eastern Churches is much easier than for the adepts of Catholicism, as illustrated by the popular motto likening a glue-like indefectible relationship to a Maronite (Catholic) marriage. To that extent, articles like the one just quoted should not be unexpected. Nor would the various sub-forms of tolerated and regulated extra-marital relations with slave girls mentioned in the Syro-Roman code come as a surprise.<sup>72</sup>

But it does come as a surprise that the polygamy of the Islamic tradition appears in calque in early Christian Middle Eastern law: "If a man has two wives,<sup>73</sup> one of whom was wedded to him without *mahr* and the other had *mahr*, and he had children from both, then our law (*sunna*) allows him to bequeath to them equally" (Art. 18). Nor can that explicit mention of polygamy be an exception or the aberration of a copyist, for it is repeated in Art. 93.

Polygamy appears therefore to be an admitted fact which is legally recognized, and accepted, in the Christian Syro-Roman book. If proven true by a more sustained investigation, the consequences of such a conclusion would require a different approach to the marital practice and law of early Christendom. It is true that such instances, as well as those of the acceptable pattern of divorce uncovered by Pro-

67. *min ghayri isa'a*.

68. *talaq*.

69. *isa'a*.

70. *mahraba wa jihazaha*.

71. Note that both Babylonian and Islamic law allow the wife to leave her husband under special circumstances. Hammurabi's Code, §131 (in case of false accusation of adultery) and §142: "If a woman has hated her husband and states 'Thou shalt not have me', the facts of her case shall be determined in her district and, if she has kept herself chaste and has no fault, while her husband is given to going about out and so has greatly belittled her, that woman shall suffer no punishment; she may take her dower and go to her father's house." However, as Bottéro has noted in a conversation for *grand public*, "seul le mari avait le pouvoir de répudier sa femme", *Babylone et la Bible*, Paris 1994, 202. For the equivalent Islamic *khul'*, see infra nn.405-22 and accompanying text, and Mallat, "family law," 17-18, 38-39, 54-56.

72. The Code, like Antiquity codes and medieval Islamic treatises, is replete with references to slaves as commodities (e.g. Arts. 28, 33, 40), slave women (*ama*, e.g., Arts. 38, 41), manumission (*itq*, e.g. Arts. 21-26) etc.

73. *In kana li-rajul imra'atayn* (*sic*, instead of *imra'atan*).

fessor Geller, may be too isolated to draw a Middle Eastern legal pattern running in a continuous thread from Hammurabi to modern Muslim countries, but they constitute one faint example of a phenomenon of legal calques which calls for less bridled 'imagination' by both jurists and historians.

A recapitulation at this stage of the central elements of this proposal of a Middle East legal *koine* may be useful: a comprehensive pre-Islamic legal tradition, which strikes textual root two millennia before the Qur'an; a Muslim scripture which founds in the seventh century a fully comprehensive system of inheritance on a dominant, non-written system of '*asaba* allowing central role to the male kin, with that key concept nowhere to be found in the Urtext, the Qur'an; next door (or underneath), a Syro-Roman code where the system of inheritance follows closely the Sunni law of succession two to three hundred years before Islamic law had emerged; on the other side of the new Muslim empire, a Zoroastrian legal tradition which anticipates the main distinctive features of the Shi'i tradition; Christian judges and clerics in the 17th to 19th Century following Islamic law against the hopes and desiderata of the patriarch of the community who deemed it too 'generous' towards women; unresolved questions of chronology and 'influence', including the adoption by Christian Coptic communities in Egypt of a national law which continues to apply to them to date, and which regulates their succession according to 'Islamic law' principles of inheritance.<sup>74</sup>

Against this long and chequered history of little known but recognisable legal patterns, is formed the tidal wave which dominates the Middle East for the last millennium and a half: Islamic law.

#### ISLAMIC LAW

The fourteen or so centuries which separate us from the first Arab-Muslim conquests are an unwieldy patch with an enormous legal literature. While any linear history in the form of a legal continuum is tentative in the absolute, the denominations under which 'law' appears may be helpful for a general survey of the field.

'Law' gets expressed in the Islamic tradition in one of three words: *fiqh*, generally rendered as jurisprudence; *qanun*, which is used for law as statutes and as positive legal provisions in actual operation in a contemporary Middle Eastern society or state; and *shari'a* (or *shar'*), the generic term for Islamic law. Use of these terms

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74. All Egyptians, including Coptic Christians, follow for inheritance Law 77/1943, which is mainly inspired from the Sunni Hanafi tradition.

for 'law' offers useful insights into the overall philosophy of Middle East legal systems.<sup>75</sup>

*Shari'a* denotes Islamic law as a whole. Originally "the place from which one descends to water",<sup>76</sup> *shari'a* in the acceptance of Arab lexicographers has developed to mean "the law of water" and, with time, was extended to cover all issues, like water, which were considered vital to human existence, including "what God has decreed for the people in terms of fasting, prayer, pilgrimage, marriage, contracts, succession, war, . . .".<sup>77</sup> *Shari'a* has thence become an all-encompassing concept which embraces the entirety of legal disciplines as developed from within the Islamic tradition.

### *Qur'an and Hadith*

Strictly speaking, the *shari'a* derives from two written sources: the Qur'an, the divine Book revealed to the Prophet Muhammad in the late sixth century CE, and the *sunna*, which is the reported compilation of the conversations (*hadith*) and deeds of the Prophet collected after his death from his Companions. Depending on how a legal maxim is defined, the Qur'an encompasses between 80 to 500 verses that deal with 'law'. This has allowed scholars since Goldziher to suggest that the Qur'an's role in early Islamic law was limited. "In Syria, Egypt, and Persia, the Muslims had to contend with ancient local customs, based on ancient civilizations. To some extent they had to smooth over the conflict between inherited rights and newly acquired rights. In a word, Islamic legal practice, religious and civil alike, had to be subjected to regulation. Such guiding principles as the Qur'an itself could supply were not sufficient, for the Qur'anic statutes could not take care of the unforeseen conditions brought about by conquest. The provisions made in the Qur'an were occasional and limited to the primitive conditions of Arabia. They were not adequate for dealing with the new situation."<sup>78</sup>

Yet, the point was also made that Islamic law was first and foremost Qur'anic law. This is argued both textually and historically. Historically, the argument is the 'legal bent' of the Qur'an in an explicit and self-conscious manner, as is illustrated in chapter v: 44,

75. For a different perspective on the various Arabic renderings of 'law' in modern Egypt, see Bernard Botiveau, *Loi islamique et droit dans les sociétés arabes: mutations des systèmes juridiques du Moyen-Orient* 24-74 (Paris 1993).

76. Ibn Manzur (d.711/1311), *Lisan al-'arab* iii, 175 (Beirut 1959). The original meaning of 'path' is common to the etymology of the Islamic *shari'a* and the Jewish *halakha*.

77. Al-Zubaydi (or Zabidi) (d.1205/1790), *Taj al-'arus*, Benghazi n.d., v, 394. For a comparison with modern water law, see my "Law and the Nile river: emerging international rules and the *shari'a*," in J.A. Allan & P. Howell (eds.), *The Nile: sharing a scarce resource* 365-84 (Cambridge 1994).

78. Ignaz Goldziher, *Introduction to Islamic law and theology* 36 (Princeton 1981). (Original German, *Vorlesungen über den Islam*, 1910)

which is read as the revelation of the Qur'an to Muhammad as a law "by which standard [the Prophet must] judge" Muslims. The traditional dating of the verse has allowed one authority to put the emergence of Muhammad as law dispenser and interpreter exactly in 627, the fifth year of the Hijra, when the Prophet assumed exclusive jurisdictional competence for Muslims.<sup>79</sup> Textually, it may be true that the Qur'an had "only" 500 legal verses out of more than 6000 in total, but this a significant proportion for a book of this nature, which compares favorably with the Pentateuch, the Bible's legal book par excellence. After all, the Qur'an is much shorter than the Bible, and this relatively large number of verses is further enhanced, for the purpose of legal reach, by the unusual length of the legal verses, especially in such areas as marriage and succession.

For marriage and divorce, the skeleton of the law is readily identifiable in the main distinctive elements which attach to Islamic societies: polygamy,<sup>80</sup> repudiation as a prerogative of the husband,<sup>81</sup> "men being *qawwamun* over women" – i.e. men being more readily "in the right over women", or in a milder modern translation, men as "protectors and maintainers" of wife and family,<sup>82</sup> as well as an elaborate but incomplete system of ab intestat and testamentary succession.<sup>83</sup> Criminal law is hybrid in the system, and beside the Hammurabi-like *lex talionis*, five particular crimes are mentioned in the Qur'an, to which are attached five penalties circumscribed by the

79. Samuel Goitein, "The birth-hour of Muslim law," 50 *The Muslim World* 23-29 (1960); also published in Goitein, *Studies in Islamic history and institutions* 126-34 (Leiden 1966). For a discussion of Qur'an v: 44 in a modern context, see my *Renewal of Islamic Law*, 62-67.

80. Qur'an iv: 3.

81. Qur'an iv: 227-32; iv: 35; and Sura lxxv, entitled "*talaq*, repudiation".

82. Qur'an iv: 34. "Men as protectors and maintainers of women" is one common translation (in the widely used bilingual text-cum-translation of A. Yusuf Ali, first edition 1934) of the Arabic "*al-rijal qawwamun 'alal-nisa'*". The formula, together with the mention of "men having a degree over women (*wa lil-rijal 'alayhunna daraja*)" Qur'an ii: 228, has been the subject of an important controversy over the interpretation of the sacred text in modern 'feminist' literature. See e.g. Mallat, "Le féminisme islamique de Bint al-Houda," 116 *Maghreb-Machrek* 45-58 (1987), at 52 and n.48. The difficulty to project modern gender egalitarian concepts onto the classical age is discussed in Mallat, "family law", cited above. As historical legal calque, compare the *qahriman* of the Syro-Roman book, Art.72: "The free woman is empowered to make her husband in charge of her money and her flock, *al-mar'a al-hurra musallata an tusayyira zawjaha qahrumanan 'ala maliha wa mawashiha*". Like the Muslim tradition, this respects the separate financial legal status of the wife, while allowing her to delegate her financial power to her husband.

83. The main Qur'anic verses on intestate succession, iv:11 and 12 are mentioned above, to which should be added iv:176, establishing *kalala* (traditionally interpreted as the state of the person who dies without children, and without a father). The interpretation of *kalala* (which also appears in Qur'an iv:12) has been the subject of a recent radical revision of the early law of succession by David Powers, *Studies in Qur'an and hadith: the formation of the Islamic law of inheritance* 21-52 (Berkeley 1986). For testamentary succession, see Qur'an ii: 181 and v: 109-111, but note that the important qualifications on the right to bequeathe are *hadith*-based.

tradition.<sup>84</sup> The text also suggests a parallel collective responsibility, but the resulting picture for criminal law had to be elaborated considerably by later jurists for a coherence which has remained unsatisfactory to date. This incoherence is due to the difference worked out by the jurists on the basis of the Qur'anic text between *ta'zir* on the one hand – that is, for crimes not specified in the text, incurring therefore penalties which are at the judge's discretion – and, on the other hand, the specific *hadd* crimes attaching to the five categories just mentioned, and which incur a fairly automatic penalty regulated or adumbrated in the Urtext.

In the case of agnatic priorities in succession, with the agnates appearing in Sunni law as the residual heirs, "customary" law of crime is also residuary in the concept of *diyya* as collective compensation for both intended and accidental criminal injuries.<sup>85</sup> As for economic law, the staples are well known, even if particularly skeletal: the necessity to abide by contracts and the prohibition of *riba* (interest, usury) and other distortions of fair markets.<sup>86</sup>

The other formal scriptural source for Islamic law is the *hadith* or *sunna*. The *sunna*, a term we have encountered for 'law' in the Syro-Roman Code, acquired in Islam the more specific meaning of the acts and words of the Prophet Muhammad. The *sunna* is divided by scholars as Muhammad's sayings,<sup>87</sup> better known as *hadith* (words, conversation), his actions,<sup>88</sup> and his silence.<sup>89</sup> The *hadith* represents the most important part of the *sunna*, and consists of several thousand aphorisms attributed to the Prophet, related by his companions, and collected by scholars over the centuries. There is, as one could expect, a vast literature on the subject, resulting from an established full discipline of *hadith* scholarship, including studies of the Prophet's companions, of tradents and relaters, of authenticity and

84. *zina*, unlawful intercourse, for which the penalty is death by stoning (Qur'an xxiv: 2-3, the Qur'anic text establishes one hundred lashes as penalty for the adulterer or adulteress, but this was modified into stoning by *hadith*); *qadhif*, false accusation of unlawful intercourse, Qur'an xxiv: 4-5, for which the penalty is eighty lashes; wine drinking and gambling, Qur'an ii, 219, v: 93-4, for which no specific penalty is mentioned (on the basis of *hadith*, wine drinking is punished with flogging); theft (Qur'an v: 41), for which the penalty is amputation; and highway robbery, for which the penalty is death by crucifixion, Qur'an v: 33 (Again, note that highway robbery, *qat' al-tariq*, does not appear as such in the Qur'anic text, where the concept is about those who "create havoc on earth, *fasad fil-ard*" or "wage war against the Prophet".)

85. Qur'an iv: 92 (*diyya* for homicide, manslaughter); ii: 178-79 (principle of *qisas*, the law of talion, repeated xvi: 126, developed in v: 45, "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth").

86. Abide by your promises and contracts (Qur'an v:1; xvii:34); avoid fraud (generally lxxxiii: 1; in weights and measures, xvii: 35), reject *riba* (ii: 275-76; iii: 130).

87. *sunna qawliyya*.

88. *sunna fi'liyya* (literally the *sunna* of doing, which represents the Prophet's reported acts)

89. *sunna taqiririyya*, which consists of reported silences of the Prophet suggesting either his indifference or acquiescence.

"strength" of various *hadith* depending on the trustworthiness of reporters and the chains of transmission, and of the collections of *hadith* as such and their internal structures. A formally sophisticated taxonomy of *hadith* was elaborated in due course by scholars like Ibn al-Salah (d.642/1244), and it is generally accepted in the Sunni tradition that the field was unruly "until Ibn al-Salah came. . . and elaborated on the arrangements of al-Khatib,<sup>90</sup> put order in its dispersed meanings and added to it some of the best results [of the science of *hadith*], ordering in his book<sup>91</sup> what was disorderly in others. This explains why people used it and followed it so much. Innumerable are the commentaries, manuals, books pro and contra. . .".<sup>92</sup> The debate on *hadith* is significant and complex. It involves, as for the Qur'an, problems of canonization and of historical genesis, which has involved in the past years a significant number of scholars across East and West.<sup>93</sup>

First it is important to underline the fact that *hadith* is more than just a textual font for the *shari'a*. As is the case for the Qur'an,

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90. Al-Khatib al-Baghdadi, d. 463/1171, author of *al-Kifaya* and of *al-Jame' li-adab al-shaykh wal-same'*, and other books on *hadith*.

91. Ibn al-Salah, *Muqadimma fi 'ulum al-hadith* (introduction to the science of *hadith*), M. Dib al-Bagha (ed.) (Damascus 1984).

92. Muhammad Abu Zahu, *Makanat al-sunnah fi al-islam* (the place of *sunna* in Islam), Cairo 1984 (or. 1959), 490-91, citing on Ibn al-Salah the later *hadith* compiler al-Hafiz Ibn Hajar al-'Asqalani (d. 852/1449). See also the more recent M. al-Sabbagh, *Al-hadith al-nabawi* (The Prophetic *hadith*) (Beirut 4th ed. 1981).

93. These include the towering figure of John Wansbrough, who joined Qur'an, *hadith*, *maghazi* (literature on the early Islamic conquests) and *sira* (the literature on the life of the Prophet) in an investigation of processes of interpretation which addressed the "sacred" literature of Islam as a genre. There is now a Wansbroughian school which includes a number of prominent disciples like Gerald Hawting, the late Norman Calder, and Andrew Rippin. Other important scholars in the field include William Graham, *Divine word and prophetic word in early Islam* (The Hague 1977); John Burton, *The collection of the Qur'an* (Cambridge 1979); *The sources of Islamic law: Islamic theories of abrogation* (Edinburgh 1990); *An introduction to the hadith* (Edinburgh 1994); G.A. Juynboll, *Muslim tradition: studies in chronology, provenance and authorship of early hadith* (Cambridge 1983). Burton and Juynboll have laid emphasis on the coherence and consistency of the internal *hadith* discipline in classical Islam, against more 'revisionist' schools which started with Ignaz Goldziher and continued with Joseph Schacht, Patricia Crone and Michael Cook. Crone and Cook have published a controversial essay on the emergence of Islam as a Jewish sect in *Hagarism: the making of the Islamic world*, (Cambridge 1977). (See Wansbrough's criticism in 41 *Bulletin of the School of Oriental and African Studies* 155-56 (1978)). This thesis was toned down in later works of more limited scope, like Cook's *Early Muslim dogma: a source-critical study* (Cambridge 1981); and his short *Muhammad* (Oxford 1983). An important discussant of early Islam was the foremost scholar of Islamic law this century, Joseph Schacht, who wrote an important book on *The origins of Muhammadan jurisprudence* (Oxford 1950), eliciting strong reactions from Muslim scholars, notably Muhammad Mustafa Azami, the author of a well researched criticism of Schacht's findings, M. M. al-Azami, *On Schacht's origins of Muhammadan jurisprudence* (Riyadh ca 1985), and in that vein recently Yasin Dutton, *The origins of Islamic law* (London 1999). Twentieth scholars writing in Arabic include the Egyptians Muhammad Abu Zahra and Muhammad Abu Zahu; the Lebanese Subhi al-Saleh and Subhi Mahmasani, and the Syrian Muhammad Sa'id Ramadan al-Buti.



many fields are elicited by the Prophet's *Tischreden*, including for uses internal to *hadith* criticism and the study of the reporters of the *hadith*.<sup>94</sup> The 'science' of *hadith* permeates several fields of scholarship, including history and literature.<sup>95</sup>

Secondly, and this lies in contrast to the Qur'an, there is no definite common Urtext for *hadith*. This means that the two main branches of Islam, the Sunnis and the Shi'is, do not use the same texts as their *hadith*. There is no Shi'i version of the Qur'an, but there are specific Shi'i *hadith* compilations, which came much later in "official" history than for Sunnis. The process of *hadith*-compiling for the Sunnis is restricted to the sayings of the Prophet Muhammad as related by his companions and eventually recorded by six main compilers: Bukhari (d. 256/870), Muslim (d. 261/875), Ibn Maja (d. 273/887), Abu Dawud (d. 274/888), Tirmidhi (d. 278/892) and Nasa'i (d. 302/915).<sup>96</sup> In addition, one finds other important compilations of varying comprehensiveness,<sup>97</sup> including early books written by the great legal eponyms of the tradition, whose language pertain more closely to *hadith* than to law. The *Muwatta'* of Malik ibn Anas (d. 179/795) and the *Musnad* of Ibn Hanbal (d. 241/855) are two such examples.<sup>98</sup>

Shi'is share many of these *hadith*, but have developed over time their own books of reference. The four early books of Shi'i *hadith* were compiled by three scholars (Kulayni, d. 328/940; Ibn Babuya, d. 380/991 and Tusi, d. 460/1068), but there are also vast compilations of Shi'i *hadith* of a later period, notably al-Hurr al-'Amili's *Wasa'el al-Shi'a* (d.1110/1699). A key difference for the so-called "Twelver" Shi'is<sup>99</sup> is the use not only of Prophetic *hadith*, but also of the sayings

94. known as *'ilm al-rijal*.

95. On early history and *hadith*, see Tarif Khalidi, *Arabic historical thought in the classical period* 17-82 (Cambridge 1994). This includes a serene appreciation of the current state of *hadith* historiography, e.g., at 20 n.6; and a long useful footnote 20 on *hadith* literature, at 26-27.

96. See A.J. Wensinck (with, later, J.P. Mensing), *Concordance et indices de la tradition musulmane: les Six Livres, le Musnad d'al-Darimi, le Muwatta' de Malik, le Musnad de Ahmad ibn Hanbal* (Leiden 2nd ed. 1992). (8 vols. in 4). The original edition was published between 1936 and 1988. Of common usage is the compilation by the (nominally) Zaydi jurist al-Shawkani (d.1250/1832), from Yemen, *Nayl al-awtar*, Beirut ed. in 10 volumes (original Cairo 1297), with two volumes of indexes dated 1992.

97. E.g., the recently published 'Abd al-Razzaq al-San'ani (d.211/826), *al-Musanaf*, Habib al-A'zami ed., 11 vols., (Beirut 1970-72), used extensively by Harald Motzki, *Die Anfänge des Islamischen Jurisprudenz- Ihre Entwicklung in Mekka bis zur Mitte des 2./8. Jahrhunderts*, (Stuttgart 1991). See the review of Maher Jarrar in 40 *al-Abhath* 129-42 (1992).

98. The *Muwatta'* of Malik, the eponym of the Maliki school of law, was edited by Sahnun (d.240/854) in a 16 volume-collection known as the *Mudawwana*, and by others. See Dutton, *supra* n. 93, at 22-31 and *passim*.

99. Twelver, *ithna 'ashari*. The majority of Shi'is believe in the special place of the Twelve *imams* of the tradition, from the cousin and son-in-law of the Prophet, 'Ali, to the twelfth *imam*, who disappeared in 329/894. This disappearance started the Great

ascribed to the twelve Imams of their tradition, especially, in the case of law, those sayings attributed to the jurist Ja'far al-Sadeq (d.147/765), the sixth Imam.

In addition to the *hadith* eliciting various types of interpretation which are not always legal, and in addition to different compilations of *hadith* amongst Sunnis and Shi'is, the use of *hadith* as "law" is a particularly complex one, even if such use is massive and current. One example is the *mut'a*, the temporary marriage permitted by the Shi'is on the strength of a *hadith* qualifying a verse in the Qur'an where the concept appears,<sup>100</sup> whereas Sunnis consider such a legal arrangement absolutely void. "We must", Goldziher wrote a century ago, "regard the *mut'a*-marriage as the sharpest legal dispute between Sunni and Shi'i Islam."<sup>101</sup>

As is the case for the Qur'an in the verse on *mut'a*, the aphoristic nature of the *hadith* has lent itself to a sophisticated body of legal hermeneutics, not least in the dialectic between the two *Ur* sources, the Book and the *sunnah*: "The *hadith* collections, by virtue of their size alone, dominated the hermeneutic process, but the relationship between Qur'an and *hadith* was difficult to express. Some jurists accepted that the *sunnah* might 'abrogate' the Qur'an; others preferred to say that the *sunnah* 'passed judgment' on the Qur'an, or that it 'clarified' and 'explained'. There were variant views within schools. Whatever the preferred wording, none would disagree with the statement attributed to the Syrian jurist Awza'i (d.157/774) that the Book is in greater need of the *sunnah* than the *sunnah* is of the Book. The vitality, complexity, and exuberance of *fiqh* literature – and many of the fundamental norms of the law – are unthinkable except in relation to the large body of revelation constituted by the *hadith*."<sup>102</sup>

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Occultation (*ghayba*) which Twelver Shi'is believe will end when the vanished *imam* returns to redeem the world. The word *imam* is common amongst all Muslims as leader of the prayer, or distinguished scholar, but it is usually reserved for the twelve figures of the tradition by the that branch of Shi'ism.

100. Qur'an iv: 24: "*fa ma istamtatum bihi minhunna fa'tuhunna ujuruhunna faridatan*, literally 'and give them their fees for the pleasure (*mut'a*) you received from them.' Sunnis consider this pre-Islamic practise to have been forbidden by the Prophet, alternatively by Caliph 'Umar (reigned 12-24/ 634-644). Shi'is rely on a *hadith* by Ibn 'Abbas (d. 68/688) to confirm the standing of the rule. For a clear exposition, see s.v. *mut'a* in the first edition of the *Encyclopaedia of Islam*, Leiden 1916, by W. Heffening. It is also suggested that the institution of *mut'a*, like the laws of succession, continues for the Persian-Shi'i ambit previous Zoroastrian legal traditions, Hjerild, "Islamic law and Sasanian law," 53; M. Macuch, "Die Zeitehe im Sasanidischen Recht – ein Vorlaufer der shi'itischen *mut'a*-Ehe in Iran ?," 18 *Archaeologische Mitteilungen aus Iran* 187-203 (Berlin 1985); Perikhanian, "Iranian society and law," 649-50.

101. Goldziher, *Introduction to Islamic theology and law*, 209. For a comprehensive work on early Shi'i-Sunni differences, S. H. M. Jafri, *The origins and early development of Shi'a Islam* (London 1979).

102. Norman Calder, entry on 'Law', in J. Esposito (ed.), *The Oxford encyclopaedia of the modern Islamic world* ii, 451 (New York 1995), 4 vols. In a long introduction to a standard edition of Bukhari's *Sahih*, the modern Arab editors assert the total equality

Another example, previously discussed in terms of Zoroastrian/Syro-Roman difference, is the acceptance of the concept of *'asaba* for the Sunnis as key organizer of the whole succession scheme, and its rejection by the Shi'is.

The way this distinction appears within the textual debate shows the importance of the *hadith* as qualifier of central importance in the legal system.

From a textual point of view, the Sunnis rest their case on a central *hadith* which one of the companions, Ibn Tawus, heard from the Prophet: "Give the shares [of the estate] to those to whom it belongs [under the rules of the Qur'an], and what remains to the closest male".<sup>103</sup> The formula appears four times in Bukhari's book of succession in his standard compilation of the Prophet's sayings.<sup>104</sup> However, the concept of *'asaba* itself does not appear in that context. Where the word appears – only once –, the context relates a rare case of succession in which a woman dies in labor, and her fetus also dies. The *hadith* in this case gives her estate to her sons and husband, but leaves "reason to her *'asaba*".<sup>105</sup> The rule is unclear, and seems to relate to the law of bloodmoney, and not to inheritance. It is also remarkable that the word *'asaba* does not appear in one of the earliest extant treatises on the law of succession, Sufyan al-Thawri's (d.161/778) *Kitab al-fara'ed*. Still, the aforementioned *hadith* appears in the following form in Sufyan's treatise: "Give the money according to the [Qur'anic] shares, but if the shares are left [i.e. exhausted], then to the closest male."<sup>106</sup>

In contrast, there is no room for the *'asaba*, either as vocable, or as concept, in the Shi'i scheme of succession. This is "graphically ex-

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between Qur'an and *sunna*, but acknowledge that some classical scholars, like Shatibi (d. 790/1388), and some modern scholars like al-Khawli and others, said "wrongly" otherwise (i.e., that the *hadith* has precedence in law). M. Nawawi, M. Abu al-Fadl Ibrahim, M. Khafaji, "*Sahih* ibn 'Abdallah al-Bukhari", in Bukhari (d.256/870) *Sahih*, 9 volumes, (Cairo 1376), i, 6-8, and fn. 1 at 8. An example of the importance of *hadith* as formal source in Islamic law, as well as a complicating factor in terms of its interaction with the Qur'an, can be found in the famous Prophetic aphorism on *riba*: "Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, each kind for each kind, in hand; he who increases or asks for increase commits *riba* alike whether he gives or takes; *al-dhahab bil-dhahab wal-fidda bil-fidda wal-burr bil-burr wal-sha'ir bil-sha'ir wal-tamr bil-tamr wal-milh bil-milh mithlan bi-mithlin yadan bi-yadin. Faman zad aw istazad faqad arba al-akhidh wal-mu'ta fih sawa'.*" Text e.g., in Shawkani (d. 1250/1832), *Nayl al-awtar*, Beirut n.d., v, 190. See my "The debate on *riba* and interest in twentieth century jurisprudence," in C. Mallat (ed.), *Islamic law and finance* 69-88 (London 1988).

103. *Alhiq al-fara'ed bi-ahliha fama baqiya li-awla rajul dhakar.*

104. Bukhari, *Sahih*, viii, 124-31, once at 126 and 128, twice at 127 (*Kitab al-fara'ed*, book of succession).

105. *al-'aql 'ala 'asabatiha*, id. at 128.

106. *Alhiq al-mal bil-farayad, fa-idha turikat al-farayad, fa-awla rajul dhakar*, in Raddatz, "Frühislamisches Erbrecht," *hadith* at 35.

pressed in the dictum of the Shi'i Imam, Ja'far al-Sadeq: 'As for the *'asaba* (the agnates), dust in their teeth' ".<sup>107</sup>

There are therefore internal textual explanations for the Shi'i-Sunni differences in the scheme of succession. The textual conflict dovetails with political dissensions over the succession to the Caliphate: for the Shi'is, entitlement to the political succession of the Prophet should have passed through his sole daughter, Fatima, who is both the wife of his cousin 'Ali and the mother of the two grandsons, Hasan and Hussein. The Prophet died in 632, and 'Ali was preempted by three other Caliphs until he finally sat at the helm of the young Muslim empire, much later, in 656. But his reign was brief, and he was killed by an assassin in 661, while his arch-rival Mu'awiya took over to found the Umayyad dynasty and jell the great schism in the Muslim world, still dominant to date, between Shi'is and Sunnis. There is therefore a strong political overtone to the schemes of succession, in which the Prophet's daughter, *qua* heir, plays a determining role for the Shi'is, and a secondary one for the Sunnis. Sometime in the early classical age, the political, textual, and possibly social traditions fused with a theological approach which was specific to each of the two large Muslim communities. The theological differences are "unbridgeable", even if attempts at fusion or rapprochement are variously attested to the present age.<sup>108</sup> In an effort to portray the differences as secondary to a common appreciation of the *shari'a* – a conclusion which depends on the scale and context of comparison –,<sup>109</sup> the Ja'fari school of law is sometimes portrayed as the fifth school, alongside the other four 'recognised' Sunni schools: the Hanafi, Maliki, Shafi'i and Hanbali *madhhabs*. Still, ritual and

107. N. Coulson, *Succession in the Muslim family* 108 (Cambridge 1971). This Shi'i saying is related for instance in the major compendium of Shi'i legal *hadiths* by al-Hurr al-'Amili (d.1104/1693), *Wasa'el al-Shi'a*, xxvi, 85 (*al-mal lil-aqrab wal-'asaba fi fihi al-turab*, property to the closest relative, and dust in the mouth of the agnates). It is also related in other books, such as Kulayni (d. 239/941), *al-Kafi*, vii, 75; and Tusi (d. 460/1671), *al-Tahdhib*, ix, 276.

108. The presentation of the theological differences as "unbridgeable" is Hamid Algar's. For another serene appreciation of the differences in historical context, see the chapter of the Iraqi sociologist 'Ali al-Wardi on the rapprochement attempted in 1155/1743 between Sunnis and Shi'is by the Iranian king Nader Shah, in "*Nader Qali wa mashru' al-madhab al-khames* (Nader Qali and the project of the fifth school)", in *Lamahat ijtimaiyya min tarikh al-'iraq al-hadith* (Social approaches to the history of modern Iraq), 8 vols, (Baghdad 1969-79), i, 118-48, esp. 134-36 and 147-48. On this episode of the Congress of 1743, see Algar, "Shi'ism and Iran in eighteenth-century Islamic history," in T. Naff & R. Owen (eds.), *Studies in eighteenth century Islamic history* 288-302 (Carbondale 1977). The main theological difference is about the position and reverence owed to the Twelve Imams in the Shi'i tradition.

109. For an elaborate argument in the context of comparative law generally, Chodhosh, "Comparing comparisons: in search of methodology," 84 *Iowa L. Rev.* 1025-1131 (1999).

theological differences between Sunnis and Shi'is are patent in everyday life.<sup>110</sup>

### *Fiqh*

These examples show the importance of interpretation: whatever the exact nature of Qur'anic dominance over the law and the place of the *hadith* in the system, the *shari'a* as discipline was formed over the centuries through arduous and systematic scholarship as developed by jurists of competing schools of law. Whilst formally based on the Qur'an and the *sunna*, the *shari'a* generated a logic of its own as jurists had to articulate their system in conjunction with internal coherence and social interests, needs and customs, even if it is improbable to reconstruct with any scientific certainty either "the Prophet's Arabia" or indeed the scribal and communal "collection of the Qur'an".<sup>111</sup> This is echoed in the confusion over the precise definition of the borderline between *shari'a* and *fiqh*, since the systematic exercise of developing the law over the centuries has tended to be understood under the realm of *fiqh*, with the word *shari'a* being rarely used in this context. In a general simplification, however, the *shari'a* encompasses *fiqh*, whereas *fiqh* as a hybrid of jurists' jurisprudence and substantive "textbook" law is only one of the several forms taken by Islamic law as a whole, the *shari'a*.<sup>112</sup>

110. Two simple examples: in prayer, a Shi'i person holds his hands alongside his body, whereas a Sunni crosses them. At one point in the recitation, the Sunni will hold up his or her right hand index, the Shi'i won't. These traditions, which are rooted in respective *hadiths* and elucidated in the jurists' works in the relevant sections on rituals, are equally "unbridgeable" socially, and set the two communities apart, even in common prayer. Nor are these differences less obvious in the way a Near East Orthodox Christian signs her/himself when praying: unlike the Catholic worshipper who does it with his full hand, the Orthodox Christian will only use three fingers to make the sign of the cross, and the movement is head-chest-right shoulder-left shoulder. Catholics will inverse the last two movements.

111. In addition to Burton and Wansbrough's recent works, cited *supra* n.93, one should mention Henri Lammens' (d.1937) pioneering books on Mecca and Medina at the time of the Prophet, *La Mecque à la veille de l'hégire* (Beirut, 1924); *L'Arabie occidentale avant l'hégire* (Beirut, 1928) (though heavily criticized by Patricia Crone, *Meccan trade and the rise of Islam* (Oxford 1987)). There is understandably a vast literature on the early Islamic period, including numerous biographies of the Prophet. They include Montgomery Watt, *Muhammad at Mecca* (Oxford 1953), and *Muhammad at Medina* (Oxford 1956); Maxime Rodinson, *Mahomet* (Paris 1961, new ed. 1968, English translation New York 1974); Edmond Rabbath, *Mahomet, prophète arabe et fondateur d'état* (Beirut 1981).

112. Another way of approaching the field is educational. At the university of London, the teaching of what we know as Islamic law started in the 1920s with Professor S. Vesey-Fitzgerald. The course used to be known as Muhammadan law. Two decades later, the course became known as Muslim law, and the word continued to be used until the 70s. The two main teachers were Norman Anderson, who retired from that branch in the early 1970s and Noel Coulson. The course title had by then turned into 'Islamic law', and remained so entitled after Coulson's death in 1986. The content of the course corresponded generally to the literature published by the three major exponents of the *shari'a* at London University over the century: S. Vesey-Fitzgerald, *Muhammadan law* (London 1931); N. Anderson, *Law reform in the Muslim world*

A serious student of classical Islamic law will find it primarily in *fiqh* books. These are books of law which are reputed for their complex and elaborate phraseology. They are written in a legal language which is difficult to understand even for native educated Arabic speakers. It is only after a long apprenticeship that the law as found in the *fiqh* books starts giving up its secrets.

The span of time covered by *fiqh* literature is unique in the legal history of humanity, and it is difficult to piece together a puzzle which, to say the least, is difficult to reconstruct. In the present state of scholarship on Islamic law, the Qur'an is considered by most Muslim scholars to mark a decisive beginning for the *shari'a*, and they are supported in this by an established Western authority like Samuel Goitein.<sup>113</sup> Western scholars might not dispute this argument, so long as it does not subsume the *fiqh* genre, the beginning of which has been put by Schacht in the second century AH,<sup>114</sup> while more recent scholarship varies beginnings between the first<sup>115</sup> and the third century AH.<sup>116</sup> In the absence of a historical assessment of the interface between orality and law, talk of origins will remain nebulous.<sup>117</sup> Irrespective of Sherlock Holmes-like reconstructions,<sup>118</sup> and

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(London 1976) and N. Coulson, *A history of Islamic law* (1964) cited supra n. 4. The title of Joseph Schacht's two main books moved from 'Muhammadan jurisprudence' (1950) to 'Islamic law' (1964). The terminology Muhammadan-Muslim-Islamic manifests a shift in paradigm in the Kühnian acceptance: in the first stage, there was little compunction in reducing the divinely ordained law of Islam to the persona of the Prophet. In a second phase, the use of 'Muslim' allowed a more neutral and more deferential attention to the belief of Muslims, but it expressed a static approach to the discipline, which eventually gave way to a third stage. The course was by then known as Islamic law, which corresponded in Arabic to a similar passage from *muslim* to *islami*. The shift has been noted as a sign of the impact of rising religious militancy taking over from the more sedate, Muslim state-of-fact. See Mallat, "Introduction-Islamic family law; variations on state identity and community rights," in C. Mallat & J. Connors (eds.), *Islamic family law* (London 1990), 1-9 at 3 and note 20. In educational terms, the course material developed away from the traditional coverage of history (part one) and family (part two) as the *cursus*, to a field encompassing a wide array of legal subjects, including Babylonian and Syriac calques and modern constitutional law and economics.

113. Goitein, "the birth-hour of Muslim law," cited supra n.79.

114. Schacht, *Origins*, 4 (middle of second century for "considerable body of legal traditions"), 190 (beginning of second century "when Muhammadan jurisprudence started.")

115. Motzki, *Die Anfänge des Islamischen Jurisprudenz*, passim and 262-64.

116. Christopher Melchert, *The formation of the Sunni schools of law, 9th-10th centuries C.E.* (Leiden 1997), and review by W. Hallaq, 31 *International Journal of Middle East Studies* 278-80 (1999) (third century).

117. Whilst recognizing the impressive textual work of scholars like Schacht, Calder, Burton, Crone and other historians, there is an instance which "outsiders" will miss because of their lack of familiarity with the strength of the oral tradition in the Middle East. A remarkable tradition may be just passing, of generations of *lettrés* who committed to memory thousands of verses, for instance much of the extensive poetry of the great Arab poet Mutanabbi (d.353/965), or the full epic poem of Firdawsi (d. ca 410/1020), the *Shahnameh*. One is talking here of thousands of lines. To the extent that orality and oral transmission remains, by definition, beyond the purview of the historian's perusal of texts, the assessment of the formation of early Islamic law will

the question of the fascination of the field with beginnings,<sup>119</sup> one fact is certain. From the early extant treatises, which go back to the second (or third ?) century after the death of the Prophet Muhammad, to the present day, *fiqh* has proceeded unabated, with, as a result, thousands of works some of which extend to twenty or more volumes of commentaries and commentaries on commentaries. Not surprisingly, the staggering wealth of this tradition is viewed with awe and pride by scholars and laity alike in the Muslim world, as both complexity and depth characterize these treatises, most famous among which are *al-Umm* by Shafi'i (died 204 AH/820 CE),<sup>120</sup> *al-Hawi al-kabir* by Mawardi (d. 450/1058), *al-Muhalla* by Ibn Hazm (d. 456/1064), *al-Mabsut* by Sarakhsi (d. ca 490/1097), *Bada'e' al-sana'e'* by Kasani (d. 587/1191), *al-Mughni* by Ibn Qudama (d. 620/1123), *al-Hidaya* by Marghinani (d. 593/1196), *Shara'e' al-Islam* by the Shi'i al-Muhaqqiq al-Hilli (d. 676/1277), *al-Bahr al-ra'eq* by Ibn Nujaym (d. 970/1563), *al-Sharh al-kabir* by Dardir (d. 1201/1786), through to *Radd al-muhtar 'alal-durr al-mukhtar* by Ibn 'Abidin (d. 1252/1836), which is one of the late *fiqh* compendia of the Sunni world.<sup>121</sup> The Shi'is continue to produce books in this vein, the latest by scholars

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never be 'scientific'. Still, one can argue the absence of history when there is no written history. On the discussion of the early 'oral tradition', see preliminary material in R. Stephen Humphreys, *Islamic history* 85-87 (Princeton 1991).

118. For example, the bold but excessive conclusions of Calder, *Studies*, at 146 and 180, that passage from oral traditions to systematic writing took the form of the 'note-books', the *mukhtasars*; or the brilliant use by David Powers of grammatical inconsistencies to redraw a whole "proto-Islamic law of succession" which would have preceded the present rules of the Sunni world. Powers, *Studies in Qur'an and hadith*, 211-16.

119. While that fashion might have passed, historic scholarship of early Islamic law, either in the East or the West, does not seem to ever have been impressed by Michel Foucault and other structuralists' distrust for 'the search of origins'. The Wansbrough school would seem to offer much perspective by its initiator's interest in 'canonical' breaks in Islam, literary genres, and calques, and the consequent avoidance of an obsession with dates, precedence and other repositories of civilizational and religious debts. It was followed to some extent by Norman Calder, but the fascination with origins has remained dominant in the scholarship despite the contrary direction which I prefer to read in *Qur'anic Studies* and *The Sectarian Milieu*. See generally my "Readings of the Qur'an in Najaf and London" cited supra n.8.

120. There are several editions of these classic works, many reprinted from earlier editions without acknowledgment. Most serious books on classical Islamic law have a bibliographical list including the main texts, see eg. Schacht, *Introduction*, 261-69. There is usually no point in providing the translation of classical *fiqh* titles, which are allegorical rather than indicative (e.g., *al-Umm*, the mother [of texts], *al-Bahr al-ra'eq*, the quiet sea).

121. Modern compendia of Islamic law by Sunni authors are different, in style much more "modern", and more accessible to the reader. Among the remarkable authors stand Wahbeh al-Zuhayli, *al-Fiqh al-islami wa-adillatuhu: al-shamil lil-adilla al-shari'yya wa-al-ara' al-madhabiyya* (Islamic law and its reasons: compendium of legal arguments and school opinions), Damascus 1984, in 8 vols.; 'Abd al-Razzaq al-Sanhuri, *Masadir al-haqq fi al-fiqh al-islami* (Sources of right in Islamic law), (Cairo 1954-59), in 6 vols; Mustafa al-Zarqa, *al-Fiqh al-islami fi thawbihi al-jadid* (Islamic law in its new form), (Damascus ca 1960), in 3 vols.

such as Muhsin al-Hakim (d.1389/1970), Ruhollah al-Khumaini (d.1409/1989) and Abul-Qasem al-Khu'i (d.1412/ 1992).<sup>122</sup>

The structure of a comprehensive *fiqh* compendium will depend on its length, but is generally organized in a first part on the law of rituals<sup>123</sup> and a second part on transactions,<sup>124</sup> each being subdivided into several "books".<sup>125</sup> The strictly religious dimension of the first part is obvious, but one may encounter in the works of some authors discussions on more mundane matters such as the payment of tax,<sup>126</sup> or the conditions of a just war,<sup>127</sup> and the appointment and role of a scholar<sup>128</sup> or a legal expert<sup>129</sup> to judicial position.<sup>130</sup> In the volume on transactions, there are also several books, with each devoted to a legal category such as marriage, sale, lease, legal penalties, etc.<sup>131</sup> Classical *fiqh* compendia are comprehensive works which deal

122. The leading Shi'i scholars usually publish a comprehensive treatise known as *risala 'amaliyya* (practical treatise) to attain the rank of *marja'* (literally reference) in the Shi'i world. The treatise is a compendium of *fiqh* which, in the twentieth century, has often taken the shape of a commentary/update on the nineteenth century scholar al-Tabataba'i al-Yazdi's (d. 1329/1911) *al-'Urwa al-wuthqa*, itself modelled on Murtada al-Ansari's (d. 1281/1864) *Makasib*. Khumaini's two-volume 1964 treatise, for instance, is entitled *Tahrir al-wasila*. The Iraqi Muhsin al-Hakim (d.1970) has also an extensive commentary on Yazdi's book, entitled *Mustamsak al-'urwa al-wuthqa*.

123. *'ibadat* (or worship).

124. *mu'amalat* (lit. dealings, contracts).

125. *kitab, kutub*.

126. *zakat* (lit. liberality, bounty, calculated usually at 2.5 per cent of annual profits); *khums* (lit. fifth, for the Shi'is).

127. *jihad* (literally striving, same root and original meaning as the legal word *ij-tihad*), often translated as holy war, but in fact a much wider concept.

128. *'alim*, plural *'ulama*; or *faqih* (from *fiqh*), plural *fuqaha'*.

129. *mujtahid* (from *ijtihad*), plural *mujtahidun*; *mujtahid* is more common nowadays for Shi'i scholars, but the current Shi'i connotation of the word is not true for the classical age. *Fuqaha'*, *'ulama* and *mujtahidun* are words often used interchangeably. The legal expert can also be a *mufti*, plural *muftun* (who issue a *fatwa*, plural *fatawi* or *fatawa*, equivalent to the *responsa* literature, see *infra*).

130. *qadi*, judge, plural *qudat*. *Hakem* is also used.

131. If we take Sarakhsi's *Mabsut* as an example, the thirty volumes of the standard edition include: *salat* (i, 4-253; ii, 2-143), *tarawij* (ii, 143-49), *zakat* (ii, 149-207; iii, 2-54), *sawm* (iii, 54-146), *hayd* (iii, 146-219), *manasek* (iv, 2-192), *nikah* (iv, 192-228; v, 2-229), *talaq* (vi, 2-235; vii, 2-59), *'itaq* (vii, 60-241), *mukatab* (viii, 2-80), *wala'* (viii, 81-125), *iman* (viii, 126-188; ix, 2-35), *hudud* (ix, 36-132), *sariqa* (ix, 133-205), *siyar* (x, 2-144), *istihsan* (x, 145-85), *taharri* (x, 185-208), *laqit* (x, 209-221; xi, 2-16), *ibaq* (xi, 16-34), *mafqud* (xi, 34-49), *ghasb* (xi, 49-108), *wadi'a* (xi, 108-33), *'ariya* (xi, 133-50), *sharika* (xi, 151-220), *sayd* (xi, 220-256), *dhibah* (xii, 2-27), *waqf* (xii, 27-47), *hiba* (xii, 47-108), *buyu'* (xii, 108-209, xiii, 2-199), *sarf* (xiv, 2-90), *shuf'a* (xiv, 90-184), *qisma* (x, 2-74), *ijarat* (xv, 74-184, xvi, 2-59), *adab al-qadi* (xvi, 59-111), *shahadat* (xvi, 111-77), *ruju'* *'an al-shahada* (xvi, 177-97, xvii, 2-28), *da'wa* (xvii, 28-184), *iqrar* (xvii, 184-200, xviii, 2-190), *wikala* (xix, 2-160), *kafala* (xix, 160-89, xx, 2-133), *sulh* (xx, 133-83, xxi, 2-63), *rahn* (xxi, 63-187, xxii, 2-17), *mudaraba* (xxii, 17-187), *muzara'a* (xxiii, 2-161) *shirb* (xxiii, 161-204), *ashriba* (xxiv, 2-38), *ikrah* (xxiv, 38-156), *hajr* (xxiv, 156-84), *al-ma'dhun al-kabir* (xxv, 2-191, xxvi, 2-58), *diyyat* (xxvi, 58-193, xxvii, 2-84), *jinnayat* (xxvii, 84-124), *ma'aqel* (xxvii, 124-42), *wasaya* (xxvii, 142-91, xxviii, 2-110), *al-'ayn wal-dayn* (xxviii, 110-213, xxix, 2-22), *al-'itq fil-marad* (xxix, 22-91), *al-dur* (xxix, 91-136), *al-fara'ed* (xxix, 136-212, xxx, 2-91), *fara'ed al-khantha* (xxx, 91-103), *al-khantha* (xxx, 103-114), *hisab al-wasaya* (xxx, 114-28), *ikhtilaf abi hanifa wa ibn*



with worldly matters but also point up the right ways of worship and individual devotional practice. The two are perceived in theory to belong the same realm of law, but there is a clear sense, already in early legal treatises, of the distinction between devotional practices and worldly transactions.

An example of classical *fiqh* at work can be given through aspects of the encyclopedic work of Shamseddin al-Sarakhsi (d. ca 490/1097) known as his *Mabsut*.

A look at earlier extant treatises shows how the treatment of Sarakhsi continues the tradition and improves upon it. This is readily apparent for the lawyer who examines the language and structure of 'the book of sale'<sup>132</sup> in the *Mabsut*, in contradistinction with such earlier compilers, like San'ani (d.211/826), whose own book of sales occupies a good part of the eighth volume of his *Musannaf*.<sup>133</sup> While both texts are extensive and devote dozens of pages to the law of sales, the treatment of Sarakhsi is qualitatively different in terms of the reasoned discussion of various points of law. San'ani's work is generally classified as one of *hadith*. But so could Malik's *Muwatta'*, a hybrid *hadith-fiqh* treatise which offers the source material for later Maliki law works, an indication of the quality shift of genres underlying the passage from the formative period to that which, certainly by Sarakhsi's time, had become "classical": more law as we understand it, less Qur'an and *hadith*.

In an attempt at periodization of early *fiqh*, it has been suggested that the formative period extends until the middle of the third century after the Prophet's death, when a new phase starts with the production of *Mukhtasars*, summaries which have a clearly identifiable author – in contrast to the accretions and superpositions of many an author in previous texts. This emergence, the elegant thesis goes, would herald a normalization of the process of legal teaching – "the world of the academic trainee"<sup>134</sup> – and generations of commentaries.<sup>135</sup>

The problem is that the early period will give rise to various theories, enhanced by fragmented sources and uncertain links, in addition to a natural propensity for 'new' religions to reject any formal acknowledgment to previous or neighboring ones with which they are often in competition.

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*abi layla* (xxx, 128-67), *shurut* (xxx, 167-209), *hiyal* (xxx, 209-44), *al-kasb* (xxx, 244-87), *rida'* (xxx, 287-310). Compare Kasani's divisions *infra*, n. 208, and modern codes, our study on civil law, forthcoming in French [hereinafter Mallat, *droit civil*, forthcoming].

132. *kitab al-bay'* (singular) or *kitab al-buyu'* (sales in plural).

133. San'ani, *al-Musannaf*, cited *supra* n. 97, viii, 3-318.

134. Calder, *Studies*, 246.

135. Calder, *Studies*, 244-47.

Be the formation of classical Islamic law as it may, there is little doubt that the production of a work like Sarakhsi's *Mabsut* offers a display of legal skills which heralds a different mastery of reasoning and language than the earlier – and rather frustrating – collocations of fragmentary legal segments.

Before devoting more particular attention to the book of sale as an example, within the corpus of a *Mabsut*, of the classical age of *fiqh*, it is useful to say a word about Sarakhsi and, in contrast to an imposing written legacy, the little one knows about his life and times. Such scant material on authors and editors is a characteristic of classical law. Legal lore has it that the 30-volumes (in modern print more the equivalent of a hundred volumes) of the *Mabsut* were shouted by Sarakhsi to his disciples out of a well in which his erstwhile mentor had imprisoned him.<sup>136</sup>

Shamseddin al-Sarakhsi, who died ca. 490/1097, wrote his long treatise as a commentary to the *Kafi* of al-Marwazi (d.332/943), also known as al-Hakem al-Shahid. Sarakhsi refers systematically to *al-Kafi*, although there is much discussion of reports ascribed to the two disciples of Abu Hanifa (d.150/767), Muhammad al-Shaybani (d. 189/904) and Abu Yusuf (d.182/798), and, in the book of sale, to Ibn Abi Layla (d. 148/765), often also to Shafi'i (d.204/820), and more rarely to Malik (d.179/795), as well as other authorities who are less known in the field, like Zufar (d.158/775). A systematic indexing of Qur'anic verses in the *Mabsut* shows how much sparser references to the Qur'an are in the book of sale, as opposed to other sections of the work.<sup>137</sup>

It is not always clear whether Sarakhsi's disciples, who physically committed the *Mabsut* to paper, are referring to their master commenting on Marwazi (d.332/943), or referring directly to

136. The opening of the *Mabsut* (vol.i, 2) refers to Sarakhsi "dictating" (*imla'*) the *Mabsut* from his prison in Uzjand, Transoxania (Central Asia). Sarakhsi is reported to have written the *Mabsut* as a commentary on Marwazi's "*mukhtasar*". Sarakhsi, *al-Mabsut*, i,1-3. Mays mentions the book's dictation "to his friends at the top of the well in 477 AH [1084 CE]" (*kana yumli min khatirih min ghayr mutala'a wa ashabuhu fin a'la al-jubb in 477 AH*), *Faharis kitab al-mabsut*, 78, and puts the date of Sarakhsi's death at 482/1089, while Calder mentions several dates. See Calder, "Exploring God's law: Muhammad ibn Ahmad ibn Abi Sahl al-Sarakhsi on *zakat*", in Toll and Skovgaard-Petersen, *Law and the Islamic world*, 57-73, at 58 n.4, and the entries 'Sarakhsi' in the two editions of the *Encyclopaedia of Islam*.

137. From the Lebanese scholar Khalil al-Mays' useful indexes to the 30 volumes in *Faharis kitab al-mabsut* (Beirut 1978). There is unfortunately no thematic index in this important work. The indexes are those of the subdivisions of the *Mabsut*, volume by volume, (11-355): Qur'anic verses cited (356-410), Prophetic *hadith* (411-482), names (483-578), sons ("ibn. . ." 679), nicknames (*alqab*, 580-582), women (583-587), and books (588-90). It appears that the two-volumes and a half of the *Mabsut* (vols. 12-14) relating mostly to the law of sale include 34 Qur'anic verses, compared for instance with 79 verses for the sole *Kitab al-siyar* (law of conquest), which occupies about half of volume 10. In contrast, al-Mays relates 119 *hadith* in *kitab al-siyar*, which compares well with over 200 *hadith* he relates in the law of sale.

Marwazi. Only a patient reconstruction of Marwazi's *Kafi* – which has to my knowledge not been published yet – can give an answer. Our own limited work on the Hanafi books of sale suggests that the imprint of Shaybani's (d. 189/904) *Asl* heavily transpires in terms of structure, but the full unraveling of the logic in the *Mabsut* has yet to be undertaken. As in all classical glosses, the polyphonic text's clarity is dimmed by the various layers of commentary.

Sarakhsi's treatment remained subject to its nature as a commentary on his acknowledged predecessor Marwazi, himself following Shaybani and others, and the legal logic which develops in the book of sales is to be found more in the treatment of his predecessors' "principles" than in a *sui generis* new structure of the subject-matter. Only when one comes to Kasani in Hanafi law,<sup>138</sup> a hundred years later, does the full skill of a lawyer as a re-organizer of material in a coherent legal construction appear fulfilled. Like most scholars, Sarakhsi is a commentator, and his creativity constrained by the internal structure of the earlier text he writes his comments upon. This is certainly true of his book of sales, where the imprint of Shaybani's *Asl* can be documented both in terms of structure and content.

Still, the sheer massive contribution of the *Mabsut*, and the quality of Sarakhsi's legal reasoning should reserve for the Transoxanian scholar a choice place in legal history. Sarakhsi deserves a book-length monograph as the classical age full-blown lawyer *par excellence*, but our presentation will be limited to a few characteristics one can find in the *Mabsut*.

The first characteristic can be found in the pell-mell treatment of law by Sarakhsi, as indeed by most great commentators in the tradition. Roy Mottahedeh has once observed that the reader will find in *fiqh* books unexpected gems in unexpected places. Before we examine the logic of Sarakhsi in the field of obligations, let us follow one such gem in the twenty-third volume, in a discussion by Sarakhsi in the "book of water shares."<sup>139</sup>

The passage appears in the section of the *Mabsut* dealing with water, where we suddenly hear Sarakhsi complaining about the impairment of a person's right.

The question put to the Transoxanian jurist is about "the validity of the granting of the emir of Khurasan to an individual of a right of irrigation from the waters of a great river, when that right was not [so established] before, or when the individual has irrigation for two *kuwwas* [a measure of flow] and the Emir increases this measure and grants him that right [i.e., extends it] over a land which may or may not be the land of a third party".

138. And Maimonides in Jewish law, see *infra* 214.

139. Sarakhsi, *Mabsut*, xxiii, 161-204, *kitab al-shirb* (*shirb* is the water share, as opposed to *shurb*, which is drinking).

This is the occasion for Sarakhsi to explain the limits of the ruler's powers:

If this decision of the Emir harms the public, it is prohibited, and it is permissible if it doesn't, that is if [the operation] did not take place on the land of a third party, for the *sultan*/ruler has a right of supervision<sup>140</sup> without harming the public. So in case there is no such harm, the grant is valid for the grantee, but if harm occurs, the grant would be harmful to the public and the *sultan* is not allowed to carry it out.

"It is not permissible", Sarakhsi continued, "for the Emir of Khurasan to empty (*asfa*) a man's right of irrigation over his land for the benefit of another, and the right must be given back to the original beneficiary and his heirs."

This is followed by a most candid account of the limits of law in real life, as Sarakhsi explained that

what is meant by the word *isfa'* [from *asfa*] is usurpation (*ghasb*) but he [Sarakhsi, or Marwazi ?] kept his tongue and did not use the word usurpation, *ghasb*, for the actions of rulers because of its rough connotations, and he chose instead the word *isfa'* out of caution (towards the ruler).

Abu Hanifa, God be merciful to his memory, used to advise his friends in this manner, for man should be attentive to his own interest, keep his tongue and respect the ruler even if in such an action the ruler is equal to others before the law. Didn't the Prophet say: the hand is responsible for what it takes until it gives it back? The granting of ownership to other than the right owner is void, and the good which is wrongfully appropriated must be returned to his owner if alive and to his heirs after his death, and so for the ruler's appropriation of what belongs to the people.<sup>141</sup>

This excerpt expresses the limits of law which Sarakhsi, as a jurist prisoner, will have experienced first hand. It is eminently practical and realistic. In other texts relating to the classical law of partnership which Abraham Udovitch has thoroughly explored, one realizes the close connection between our author and the realities of commerce, against the received idea of an exercise disconnected with real life.<sup>142</sup> Contrary to the erroneous concept about the "theoretical" and

140. Supervision, *wilayat nazar*.

141. "The ruler is equal to others before the law: *al-sultan ka-ghayrihi shar'an*", *al-Mabsut*, xxiii, 183.

142. "This identity between the theoretical formulations of the late eighth century and the actual commercial practice of the eleventh through thirteenth centuries corroborates the thesis that the earliest Hanafi law treating partnership and commenda contracts is to be viewed, with minor qualifications, as a veritable Law Merchant", Abraham Udovitch, *Partnership and profit in medieval Islam* 259 (Princeton 1970). Also, for the definitive work based on the Cairo Geniza, S. Goitein, *A Mediterranean*

impractical legal considerations of *fiqh* works, *fiqh* treatments deserve therefore a closer analysis for their reflection of legal practice.

This can be further illustrated in a more attentive analysis of that part of the *Mabsut* which is devoted to sales. The patterns of continuity and distinctiveness offered by the Hanafi Transoxanian scholar in the specific instance of the book of sale can also shed some light on the historical evolution of Islamic law.

*Fiqh* is case-law and its products are, to variable extent, the result of the jurist's intellectual construct. With English common law it shares the inductive method by adducing a number of examples out of which some more general principles can be drawn. It does not posit, as in the continental European system of civil law (or Roman law in its late codified form), an overall principle or set of principles from which application derives. But *fiqh* is different from both in that it is eminently casuistic, whilst these cases are not necessarily based on precedents in real life.

This last proposition remains a hypothesis, in so far as the exact interaction between law and reality in the classical age has not been tested in any significant manner. But irrespective of work yet to be done in this important field, casuistry in the negative acceptance of the term can certainly be widely found in *fiqh* books, and Sarakhsi is no exception, who can rise with ease to arguing for mere arguing sake.

A typical example of casuistry appears in the latter part of the book of sale, where the treatment of the risk for the buyer and the seller is extensive.<sup>143</sup> The chapter starts with the case of the buyer of a slave who comes into possession of the commodity only after the seller cuts the hand of the slave. The buyer has a right of option. He can pay half the price for the slave, "since the hand of a person is half of him,"<sup>144</sup> or he could rescind the contract as the object of sale has changed in nature under the seller's responsibility. The concept of risk is rendered by one of contributory liability, which is combined here with an option for the buyer: "If he [the buyer] chooses to rescind the contract, the whole price is foregone, and if he chooses to take the [diminished] slave, he must pay half the price".<sup>145</sup>

The figure is relatively simple so far, but it rapidly becomes more complex, as Sarakhsi introduces a difference between his view and that of Shafi'i. The result in practice may be the same, as Shafi'i requires the buyer to pay the whole sum, and then to turn to the seller

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*society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, 5 vols, (Berkeley 1967-88), vol.1, 1967, 148-272: "the world of commerce and finance."

143. *bab jinayat al-ba'e wal-mushtari 'alal-mabi'*, *al-Mabsut*, xiii, 170. The footnotes which follow appear in that section, from page 170 to page 181.

144. *fa-inna al-yad min al-adami nisfuh*.

145. liability, *daman*; the diminished slave, *al-aqta'*.

in order to recoup the seller's contributory share for the diminished value of the commodity. In both cases, regardless of the reasoning of the two great scholars, the buyer pays half the value of the slave. For Shafi'i, Sarakhsi explains, the buyer remains responsible for the value of the slave even if the slave dies, that is even if the commodity perishes.<sup>146</sup> *Caveat emptor stricto sensu*. If the seller chooses to exercise his option to see the contract to the end, then the buyer is bound by the contract. He must first pay the price stipulated, even if the object of the contract has by then disappeared upon the slave's death. The buyer must therefore pay the price, and then sue the seller for the full amount.

Here again, the figure of a recourse against the buyer leads to the same end result for both Sarakhsi and Shafi'i, even if somewhat belabored in the latter's case. But the argument of Sarakhsi makes a practical difference in the case of a slave who loses the use of his hand for no fault of the seller. For Sarakhsi, the buyer can exercise his option to have the contract fully executed. If he decides to carry on with the contract and accept the slave, he must pay the whole price. Not so for Shafi'i, explains Sarakhsi: "Shafi'i considers them equal, and considers that in both cases [that is whether the buyer rejects the contract or decides to go ahead with it] risk falls on the seller for half the value".<sup>147</sup> The seller remains liable for half the value because the object of sale is still under his responsibility. It makes no difference for Shafi'i that the commodity is defective because of the buyer or not. Under the Shafi'i position as interpreted by Sarakhsi, "there is no difference if part of the commodity perishes because of the person who is still liable or for no action of hers".<sup>148</sup> The example adduced is the sale of two slaves, one of whom perishes before reception by the buyer: unlike for Sarakhsi, "the answer would be the same" for Shafi'i whether or not it is the buyer who is responsible for that death and for the decrease in the value of the overall value of the commodity constituted by the two slaves as the object of the sale. The seller remains liable because he assumes the risk of the commodity perishing or diminishing in value while still under his control.

Sarakhsi then explains why his solution is different in that case. The key consideration is "intention".<sup>149</sup> If loss is for no fault on anyone's part, then the loss is accessory and not intended, and no compensation is required from the seller. Only if loss occurs because of a tortuous act of the seller, can compensation be requested from him.<sup>150</sup>

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146. value, *qima*.

147. Shafi'i considers them equal, *Shafi'i yusawwi baynahuma*; the risk falls on the seller, *al-mabi' fi damanih [daman al-ba'e']*.

148. liable, *damin*.

149. intention, *qasd*.

150. "*fa-in fat bi-ghayr sun' ahad. . . la mahala*", *al-Mabsut*, xiii, 171.

Sarakhsi goes on with an elaborate legal argument, and his solution is further supported by the example of a third party cutting the hand of the sold slave: "The buyer has an option: if he still wants the performance of the contract, he must pay the seller the full price and then exercise a recourse against the third party for half the price, as the tort of that third party has affected [what is now] his property".<sup>151</sup>

As is manifest in these quotes, the examples increase in complexity with variations on cases with regard to the commodity and the way it is affected – e.g. if it is the foot against the hand, or the 'other' foot, or two slaves, or a slave woman who is pregnant and loses the child, or a slave girl who loses her virginity. The solution varies with the type of intermediation (distinction between direct or indirect causation),<sup>152</sup> with the persona of the intervener (seller, buyer, third party), or with intention. All these figures and variations of case law are pursued by a similar process of reasoning, sometimes involving a comparison with Shafi'i, or comparisons within the Hanafi school, to which is added the complexity of the computation of the "shares"<sup>153</sup> in the ultimate liability or debt.

The imprint of Shaybani's earlier treatise is evident throughout. One figure appeared in the original work of Shaybani's text, *al-Asl*, as follows:

A slave is sold to a buyer who does not take delivery and does not pay the price until after the seller has cut the slave's hand. In addition, the buyer, together with a third party, were also responsible for the loss of the "opposite" foot. Then the slave dies. Because of the cut hand, the buyer is exonerated for 1/2 of the price. He is liable for 1/4 of the price for his tort and the third party's tort in cutting the foot. Then the buyer can exercise a recourse against the third party for 1/2 of the penalty, which is in fact 1/8 of the slave. The slave dies after all this, so a share of 1/3 left in the value of the slave is spared the buyer, which is 2/3 of the total price, and he owes 1/8 plus 1/3 of 1/8 of the price because of his tort and the tort of the third party on what is left of the slave. The buyer exercises then his recourse against the third party for 2/3 of the 1/8 of the value for that party's tort. The third party owes therefore 1/8 of the slave's value for cutting his foot, and 2/3 of 1/8 of the value for what he wasted from the slave's soul [i.e. his integrity as a commodity]. The buyer will then owe 3/8 of the price and 1/3 of 1/8 for his tort and that of the third party.

151. property, *milk*, id., 172.

152. *siraya* and *jinaya*, loosely translatable as direct or indirect criminal tort.

153. share, *sahm*, plural *ashum*.

The buyer does not have to give away any part of the compensation he takes from the third party, even if what he receives from him exceeds his share of the value, because the third party is liable in tort to the buyer who has been delivered the commodity.<sup>154</sup>

The same hypothetical case runs as follows in the *Mabsut*:

A slave is sold to a buyer who does not take immediate delivery and does not pay the price until after the seller has cut the slave's hand. In addition, the buyer, together with a third party, were also responsible for the loss of the "opposite" foot. The buyer is liable for  $\frac{3}{8}$  of the price as well as  $\frac{1}{3}$  of  $\frac{1}{8}$  of the price, which is the share of his tort and that of the third party. By cutting one hand, the seller has destroyed half of the commodity and the buyer, together with the third party, have destroyed  $\frac{1}{2}$  of what has remained. What is left, which is  $\frac{1}{4}$ , is destroyed by tort to the extent of  $\frac{1}{3}$ , so  $\frac{1}{3}$  of that  $\frac{1}{4}$  is destroyed by the tort of every one of them all. The equation of eighths has been further cut by thirds so one multiplies 8 by 3, which makes 24, then this is divided in halves since the destruction of the buyer together with the third party is shared equally between the two, so one multiplies 24 by two for these half shares, and the sum total is 48. Liability for the [commodity] destroyed because of the seller's is 24 and for the consecutive effects 4, that makes 28, which amounts to  $\frac{4}{8}$  of the [value] of the slave added to  $\frac{2}{8}$ , bringing [the lowest common denominator] for the shares of the slave to 48, with 6 equaling  $\frac{1}{8}$ , 24 equaling  $\frac{4}{8}$  and 4 two-thirds of  $\frac{1}{8}$ . Because of his [the seller's] tort,  $\frac{1}{8}$  must be deducted; this is why  $\frac{4}{8}$  of the price plus  $\frac{2}{3}$  of  $\frac{1}{8}$  are deducted. As for the buyer, he owes  $\frac{3}{8}$  of the price in addition to  $\frac{1}{3}$  of the  $\frac{1}{8}$  as share of what was lost by his fault and as share of what was lost by the fault of the third party. The third party is [also] liable for the value [of the diminished commodity]. To the extent of the loss due to the third party's tort, the value of the sale follows: here the loss is both [the buyer and the third party's] fault and their tort is in the end 20:  $\frac{3}{8}$  of the slave and  $\frac{1}{3}$  of the  $\frac{1}{8}$ . The buyer claims back from the third party  $\frac{1}{8}$  of the value and  $\frac{2}{3}$  of  $\frac{1}{8}$ , because of the third party's fault, and loss is  $\frac{1}{2}$  of 20 i.e. 10, which is  $\frac{1}{8}$  of the slave plus  $\frac{2}{3}$  of  $\frac{1}{8}$ . The buyer can

154. The passage appears at 300-01 of Shaybani, *Kitab al-Asl*, Shafiq Shihata [= Chafic Chehata] ed., (Cairo 1954) (which includes only the book of sale, with a useful brief annotation); and, in the larger 5 vols. edition of *al-Asl*, Abul Wafa' al-Afghani (ed.), (Beirut 1990) (original edition Haydarabad 1386/1976), v, 276-77. Note that Shaybani's *Asl* is also known as *al-Mabsut*. Penalty, *arsh*;  $\frac{1}{8}$  of the slave's value, *thumn al-'abd sahihan*; tort, *jinaya*.



then exercise a recourse against the third party for  $1/8$  of the value plus  $2/3$  of  $1/8$  and does not need to give away any of it even if there remains a surplus, because the buyer has, following his tort, come into delivery [of the commodity] and the fault of the third party has now become associated with the fault of the buyer. . .<sup>155</sup>

The matter is different, continues Sarakhsi, if the buyer and the third party have committed their tort *after* the slave was delivered. There follows an ever more complicated commentary.

If one looks closely at the case and its solutions in the original Shaybani and the commentators, Marwazi and Sarakhsi, there is no significant difference either in the hypotheticals adduced or in the result reached. The difference is mostly one of Sarakhsi explaining away the figures he finds in *al-Asl*. Sarakhsi's text sounds like a mathematics professor explaining to his students the logic of a formula they are reading to him from a textbook. To make the formula clearer (!) the total is reduced to the lowest common denominator, which is 48, and the shares calculated accordingly.

A set of temporary conclusions on the method and logic of classical *fiqh* can be attempted on the basis of this brief discussion.

There is no doubt that later jurists have at heart the earlier texts which are authoritative, as in the case of Shaybani for Sarakhsi. Developments occur on a mechanistic level of refinement and explanation, without any apparent addendum beyond the ever more complex figures of seemingly absurd hypothetical cases. Here, *fiqh* does not change.

From a semantic point of view, Sarakhsi uses in his explanations the word *damen*, as well as the concept of *siraya*, both of which do not appear in Shaybani. Shaybani, however, uses *arsh*, and has already a clear concept of what *siraya* represents. In terms of legal vocabulary progress is limited.

What of structure? The general arrangement of the book of sale is difficult to ascertain in the absence of Marwazi's *Kafi*, and it is necessary to speculate on the exact structural debt which the *Mabsut* owes it.<sup>156</sup> The imprint of Shaybani's *Asl*, in contrast, is evident in terms of structure: the insertion of some chapters will appear odd to modern eyes, for instance "the sale of date trees if they bear fruit", which forms chapter 16 of *al-Asl*, and can be found tugged in the latter part of Sarakhsi's book, also fitting uneasily in the treatment.

155. destroyed, *al-talef*; death consequent to *siraya*; *al-Mabsut*, xiii, 180-81.

156. I have been able to examine a manuscript of Marwazi's *Kafi* from the Chester Beatty library in Dublin (Ms 4263), which follows indeed the *Mabsut* of Sarakhsi in its general structure. Unfortunately, the Ms is not complete, and stops at *bab al-rida'*, (chapter on suckling) well before the corresponding section on the book of sales in Sarakhsi's *Mabsut*. *Bab al-rida'* appears in Sarakhsi at volume 5 (out of 30). This suggests the full *Kafi* is a large book.

Overall, the format followed in the *Mabsut* hardly departs in that book from the one chosen by his predecessor in *al-Asl*. Both authors start with a long treatment of deferred sale, or sale on credit,<sup>157</sup> then deal with agency in such sales, followed by imperfect sales, conditions,<sup>158</sup> options,<sup>159</sup> mark-up partnership contracts,<sup>160</sup> defective sales,<sup>161</sup> the sale to and from non-Muslim monotheists,<sup>162</sup> then other special circumstances which confirm that, even for the internal structure of each chapter,<sup>163</sup> Sarakhsi does not willingly depart from Shaybani.

Constraints derived from sticking to the predecessor's plan also explain the marshalling of other issues in the law of sale which do not belong to the book of sales proper. These issues are included in such chapters as currency sale,<sup>164</sup> which is dealt with separately as a special type of sale, the regulation of land sale, preemption,<sup>165</sup> sale in the contracts of *commenda* partnerships,<sup>166</sup> etc. Despite these constraints of form imposed by the previous model which he comments upon, a distinguishing feature of Sarakhsi's treatment of like hypotheses and figures appears in the consistent and logical exposition which is unique to the *Mabsut*.

There appears in the faithful commentary on a preceding text such as Shaybani's or Marwazi's, a conscious and sophisticated development in style, which affects the overall legal logic of the text. In the case of the book of sale, as treated by Sarakhsi in contrast to his predecessors, the structure improves significantly within the limits of the texts which the commentator is operating with.

This can be illustrated through the perusal of such apparently absurd hypotheticals, like the casuistic passage quoted above, in the sophisticated legal reasoning behind the discussion of a case treated somewhat differently by a predecessor.

It would take some time and effort to see how the risk on the seller and the buyer in the example quoted above gets assessed in law. Much as the example of the hand of the slave being lost 'in transit' through the fault of either party appears far-fetched, one could take the trouble of delving into the logic of such fractions. For

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157. *salam*.

158. *shurut*.

159. *khiyar*, plural *khiyarat*. On options in the law of contract, see Mallat, *droit civil*, forthcoming.

160. *murabaha*.

161. *'uyub*.

162. *dhimma*.

163. *bab*.

164. *sarf*.

165. *shufa*.

166. *mudaraba*. On *murabaha* and *mudaraba*, which is the equivalent of the Roman *commenda* and the Babylonian 'joint adventure'/*tapputum*, see *supra* nn. 28-29 and accompanying text, and my "Commercial law in the Middle East," 129-31.

logic there is, and the modern reader would feel less lost or alienated if the subject of the example were, say, a large oil tanker. The discussion would, in the oil tanker hypothetical, examine the exact moment in time when the ship was lost, the terms of the contract or charter party, the contributory negligence of the parties, the Act of God dimension in the loss, the moment when risk passes, and the like. Even such tiny fractional details as the one adduced in the case of the lost slave would appear meaningful if the object of the dispute is a valuable commodity in a non-slave economy.

Still, there is a significant amount of sheer casuistry, which appears even more bewildering in the case, dear to our classical jurists, of the hermaphrodite's succession. While the discussion, page after page, of the hermaphrodite's inheritance shares, appears ludicrous to modern eyes, both the pleasure of the arithmetic application of the Islamic rules of succession and the potential transposition of the hermaphrodite discussion to large successions should appear more alluring to the reasoning and understanding of a modern jurist.<sup>167</sup>

Casuistry should therefore be taken into account when one reads the *fiqh* books. The sophistication in the computation of compensation ratios is not the sole locus of Sarakhsi's legal skills. Legal logic in its most positive sense is also pervasive in the *Mabsut*, and less empathy is required for the 20th century reader of the taxonomic rearrangement by Sarakhsi of the law of sale, adumbrated in the very first lines of his book-long chapter on the subject.

Sarakhsi starts with a broad brush: "God has made money the reason to establish the benefits of the people in the world";<sup>168</sup> commerce has been regulated "because what each person needs is not allowed in all circumstances". *Riba* follows, as "commerce if of two kinds: what is allowed<sup>169</sup> is known in the law<sup>170</sup> as sale.<sup>171</sup> What is forbidden is called *riba*. Both *riba* and sale are commerce". The relevant verse in the Qur'an on the distinction between *riba* and sale is quoted next,<sup>172</sup> and Sarakhsi goes on to the definition of sale and *riba*.

"The conclusion of the contract takes place with two expressions which are formulated in the past tense, 'I sold and I bought', over two objects, each of which is of fungible value and can be acquired".<sup>173</sup> This definition of a contract reveals the combination of formalism, as expressed in the need to use the past tense for verbs, and of substan-

167. Examples of the literature on hermaphrodite (*al-khantha*) can be seen in Sarakhsi's *Mabsut*, xxx, 91-103, and Kasani's *Bada'e*, vii, 327-30.

168. reason, *sabab*, *al-Mabsut*, xii, 108.

169. *halal*.

170. *shar'*.

171. *bay'*.

172. "God has allowed sale, and forbidden *riba*," Qur'an ii:275.

173. two objects, *mahallayn*; fungible value, *mal mutaqawwim*. Id., 109.

tive appreciation, which appears in the concept of fungible value.<sup>174</sup> To explain the importance of the formal use of past tense, Sarakhsi introduces his difference with Shafi'i, who allows the use of the present tense in both the contract of sale and the contract of marriage. Why does Sarakhsi, unlike Shafi'i, permit the use of the present tense to contract a marriage, while rejecting it for the parties in the contract of sale? The rationale is twofold: first, Sarakhsi explains, use of the present tense is unnecessary for the contract of sale because there are no preliminaries in sale which find their root in the distinction between preparation and conclusion, as is the case of betrothal in contradistinction with proper marriage. Secondly, use of the present tense is possible in marriage, in contrast to sale, because the parties are always separate and distinct in a sale, whereas there are dominant figures of agency which allow the contract to be concluded in marriage by proxy. Agency is not the usual format for the contract of sale, and only the use of the past tense makes the sale transaction secure.<sup>175</sup>

Sarakhsi then compares sale contract and lease: "The contract changes in nature not because of the [parties' outward] expression", for "we know that what matters is what is intended".<sup>176</sup> By referring to examples which contradict formalism in practice and give way to intention, and by insisting on general use in order to contradict "rare cases" which conform in principle more strictly with a rule, Sarakhsi appears at considerable variance with Shafi'i as well as with Shaybani's treatment of the sale contract.

One can see in these examples how the logic of the academic lawyer develops: the contract sale, in Sarakhsi's view, is the dominant, model contract. It operates *sui generis*, and other important contracts, like marriage, are modeled after it. While each retains its own characteristics, the contract of sale must be entered into in a determined/past form to avoid uncertainty. As the standard contract, it allows other inferences of a general type, most remarkably the intention of the parties. Less current contracts, such as leases, must follow that model.<sup>177</sup>

174. By further refining the analysis, Sarakhsi distinguishes between a contract which is a sale, and the donation for a consideration other than a financial reward, *al-hiba bi-shart al-'awad*. Id. at 109.

175. It was drawn to my attention by John Donohue that the definition of the verb mode *fa'ala* as 'past' is inaccurate, even if contemporary school children are taught that the mode is *madi*, literally 'past'. In fact *madi* should be translated as determined, as opposed to the 'present', *mudare'*, which is undetermined. The nuance makes particular sense in a juridical setting like the issue discussed by Sarakhsi. The past theme is actually the "determined" (or determinate, or even terminated to use an equivalent legal jargon) form of the verb.

176. *fa-'arafna anna al-mu'tabar ma huwa al-maqsud, . . . wa-bihi yakhtalif al-'aqd la bi'tibar al-lafz*, *al-Mabsut*, xii, 140.

177. Such an insistence on the use of proper verbal tense was probably the reason why some twentieth century authors, like the Egyptian scholar Sanhuri, insist on the

Against the formalistic image of the law of contracts, the rest of the book is studded with references to intention, as mentioned incidentally with regard to intervening factors in the sale of a slave. In another anti-formalistic example, the six genres of the *hadith* on *riba* are considered not to be exclusive, meaning for Sarakhsi that the list could be extended if the appropriate analogy is drawn. Except for some jurists like Dawud al-Zahiri (d.270/884), the eponym of the literalist Zahiri school, and 'Uthman al-Batti (d.143/760), he explains, the jurists of the land have agreed "that the rule of *riba* is not meant in the six commodities [of the *hadith*]<sup>178</sup> and that it includes a meaning which goes beyond them to other commodities."<sup>179</sup> In another instance also related to *riba*, Sarakhsi refuses to acknowledge that "meaning be restricted to what it entails in the language". If *riba* means excess or increase, then "it is an increase in itself because [the example] of what is being eaten, if compared to other such things that could also be eaten, will not be equivalent in taste except rarely. The rule however cannot rest on rare cases, and even though this increase stands in itself, its importance was dropped in law to facilitate matters on people."<sup>180</sup>

One can see how a commentary, however extensive, based on the template offered by the earlier books of authors like Shaybani and Marwazi constrains the later author, while consistent reference to prevailing trade practice will allow him nonetheless to set the record on a more practical basis than the original handbook might allow.

Even in terms of structure, there is no doubt that Sarakhsi's contribution offers a more developed and convincing legal treatment than his predecessors and masters, Shaybani and Marwazi, through the elaborate arguments which develop at key junctions as effective liaisons within a chapter. In the first section of the book of sales as quoted above, in which is followed Shaybani's *Asl*, Sarakhsi introduces the contract of sale after a brief word on the philosophy of commerce. Next is discussed the void contract of sale upon the advent of *riba*, and after an extensive discussion of the various figures of *riba* in sale contracts, the contrast offered by the acceptance by *fiqh* of the sale of future things which is typified by deferred sale, or sale on credit.<sup>181</sup> Within this type of sale, the discussion is extensive. In part, this follows Shaybani's long chapter on the subject,<sup>182</sup> but Sarakhsi's distinctive coherence replaces his predecessor's collocation of legal

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formalistic dimension in contracts, against a number of *hadith* – and to some extent Qur'anic verses – which imply a stronger role for intention, and which in our view require a different emphasis in our approach to the Islamic law of obligations, see Mallat, *droit civil*, forthcoming.

178. Reference to the six commodities *hadith* can be found in *supra* n. 102.

179. Jurists, *fuqaha*; meant, *maqsud*, *al-Mabsut*, xii, 112.

180. To facilitate matters on people, *taysiran 'ala al-nas*, id., xii, 115.

181. *salam*.

182. Shaybani, *al-Asl*, 1-70 in the edition of Chehata, 5-69 in the Afghani edition.

aphorisms with a consistent analysis of several facets of the credit contracts. This starts with the definition, which is taken from Marwazi: "*Salam* means taking possession of a commodity against future payment. It is a type of sale to exchange money against money". Sarakhshi explains further that *salam* is synonymous with deferral,<sup>183</sup> and shows why *salam* is different from *riba*: "The time of the sale occurs following the existence of the object of the contract in the ownership of the party. *Salam* is accepted in usage for what is not in the seller's [immediate] property. The contract anticipates in time, and was therefore called *salam* or *salaf*. By way of analogy, *salam* should not be accepted because it is the sale of the non-existent commodity . . . The sale of a non-existent commodity should be void, but we set analogy aside on the basis of the Qur'an and the *sunna*."<sup>184</sup>

A tight legal argument on the conditions of *salam* is then presented, and seven conditions attributed to Abu Hanifa (d.150/767, the eponym of the Hanafi school to which Sarakhshi belongs) are discussed in terms of the need for certainty in a valid contract and "the avoidance of ambiguity conducive to dispute".<sup>185</sup> Here again, there are extensive developments relating to each of Abu Hanifa's seven conditions,<sup>186</sup> which are occasions to elaborate on "*salam* [as] a commercial contract",<sup>187</sup> three days as the minimal time period for *salam*, the distribution of risk in case of loss, the place of contract in the event of *salam*, the types of commodity which can be the object of *salam*,<sup>188</sup> and the consequences of death on *salam*. Sarakhshi is then drawn on the terrain of *istisna'*, a type of manufacturing contract which clearly lies for him within the financially problematic terrain of contracting future things, a practice which should also be prohibited because of uncertainty. To explain the prohibition away, he offers an elaborate solution which can be summarized as the need to accept this type of contract by law as a matter of usage and practicality.<sup>189</sup>

183. *salam* is synonymous with deferral, *al-salam wal-salaf bi-ma'na wahed*, *al-Mabsut*, xii, 124.

184. Id. at 124. *Salaf* is credit, also downpayment, advance.

185. *kull jahala tufdi ilal-munaza'a al-mani'a 'an al-taslim wal-tasallum yajib izalatuha bil-i'lam*, xii, 124.

186. The seven conditions of Abu Hanifa are, according to Sarakhshi: "*i'lam al-jins fi al-musallam fih*, *wa i'lam al-naw'*, *wa i'lam al-qadr*, *wa i'lam al-sifa wa i'lam al-ajal wa i'lam al-makan alladhi yufihi fih wa i'lam qadr ra's al-mal fima yata'allaq al-'aqd 'ala qadrih*: 'race, family', *jins*; type, *naw'*; quantity, *qadr*; quality, *sifa*; term of delivery, *ajal*; place of delivery, *makan*, "in addition to capital as quantity might require." *al-Mabsut*, xii, 124.

187. *al-Mabsut*, xii, 126.

188. the place of contract *majlis al-'aqd*, on which see Mallat, *droit civil*, forthcoming. Sarakhshi, *al-Mabsut*, xii, 126ff.

189. This centrality and prevalence of custom in *fiqh* is developed *infra* in the section on custom.

One can see the progression of an argument in a style which a lawyer will find enticing despite the relative straitjacket imposed by the earlier commentaries of Shaybani or Marwazi. Sarakhsi's ability as a lawyer appears throughout in two ways: he operates transitions which are convincing and logical, and he tries to transform the commentary into a textbook. Where no apparent legal outline was followed by his predecessors, he is consciously and painstakingly constructing one, whence the progression in the book of sale from the overall logic of commerce, to the contract of sale and its impediments, to formalism and intention, to the pitfalls of *riba*, to the sale on credit and/or of future things,<sup>190</sup> and finally to the specific case of manufacturing.<sup>191</sup> This does not mean that Sarakhsi will not, from time to time, fall prey to casuistry in the negative sense of the word, but the legal logic of the *Mabsut* is compelling overall. Hence also its popularity with Islamic lawyers to date.

If a generalization on the basis of Sarakhsi, surely, cannot be conclusive, a brief glance at the next great Hanafi work will show the new level of legal abstraction and rigueur reached by the jurists in the classical age. Kasani (d.587/1191), who died about a hundred years after Sarakhsi, starts his equally extensive book of sale with the following sentence:

"The treatment in this book deals with the basis of sale, the conditions relating to that basis, the categories of sales, unacceptable sales and related issues, the effectiveness of sale and [lastly] the suspension of the effectiveness of a sale."<sup>192</sup>

What follows is systematic and orderly, and the reader is able to fathom the reasoning for each chapter in the manner announced in the outline, and within each chapter, in the form of subdivisions which are presented from the start, and thoroughly discussed in the order of their announcement.

Following his outline, Kasani addresses the nature of the offer and acceptance in sale contracts. That nature is determined by the complementarity of the two constitutive parts in the sale contract – offer and acceptance –, and the necessity for them to be simultaneous. Hence the corollary of the contractual session concept (the "unity of the meeting" is suggested but not spelled out by Kasani here<sup>193</sup>), which introduces the possibility of a change of mind before the meeting is over, *apud* various *hadiths*.

190. *salam*.

191. *istisna'*.

192. 'Ala' al-Din al-Kasani, *Bada'e' al-sana'e' fi tartib al-shara'e'*, 7 vols in 5, Beirut n.d., copy of the Cairo ed. 1328/1910. This and the following quotations start at v, 133.

193. *majlis al-'aqd*. But see Kasani, *Bada'e'*, v, 137 middle and 193 bottom. Basis, *ruk'n*.

Thirdly, Kasani deals with the conclusion of the contract by action, in contrast to the contract by verbal commitment. Sale may be "an exchange in fact, which is a deal, and is called sale by *murawada*." Here, he explains the difference he has with Shafi'i, who rejects the validity of such a contract, as "the custom of law"<sup>194</sup> does not know non-verbal sale for Shafi'i. The Hanafi Quduri (d.428/1037) is also said to make a distinction between precious and ordinary commodities, and to reject non-verbal sale for precious commodities, though not for ordinary ones. Kasani, using elaborate parallels from Qur'anic verses, differs both from Shafi'i and from his illustrious Hanafi predecessor, and concludes that there is nothing which should prevent the conclusion of a sale in this way: "Validity is in principle free from such distinction."<sup>195</sup>

This is clearly an elaborate juristic argument which betrays a well-structured, mature, legal mind. The rest of the book of sale is equally consistent, and a close examination of each division shows the effort of a systematic exposition following a determined outline.

The whole book can be followed through six main subdivisions which Kasani presents at the outset of the book, starting with the definition of sale through to its dissolution.<sup>196</sup> This structure, which Kasani follows systematically, is adapted from his master Samarqandi (d.540/1145). It may be not be totally comforting to modern eyes, but it contains much of what one needs to know for a comprehensive regulation of the law of sale. After what corresponds to a general definition,<sup>197</sup> Kasani devotes two long chapters on the conditions and types of sale,<sup>198</sup> then a chapter on "the unacceptable sale",<sup>199</sup> followed by the various consequences of imperfection in the sale contract.<sup>200</sup> The fifth chapter analyzes the dissolution of the contract. In the sixth and last chapter, he discusses the suspension of the effectiveness of a sale.<sup>201</sup> To the end, divisions and subdivisions follow rigorously as announced. In the last chapter, for instance, Kasani explains once more that there are two ways to terminate the contract (or "end its effectiveness", which is the same thing): by dissolution,<sup>202</sup> and by "novation".<sup>203</sup> Termination of the contract by dissolution is distinguished from its termination by novation in that the first af-

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194. 'urf al-shar'.

195. Kasani, *Bada'e'*, v, 134 middle: "*Al-jawaz fil-asl mutlaq min hadha al-tafsil*."

196. Kasani, *Bada'e'*, v, 133-310.

197. *rukn al-bay'*, literally the cornerstone of sale, v, 133-34.

198. Mixed together, with Kasani clearly preferring to talk first about types of sale, then about the conditions, rather than the reverse which appears favoured by Samarqandi. Kasani, *Bada'e'*, v, 134-201 (types, *aqsam*); 201-28 (conditions, *shara'et*).

199. *ma yukrah min al-baya'at*, 228-33.

200. The regime of the sale contract, *hukm al-bay'*, with a gradation including *sahih* (valid), *fased* (voidable), *batel* (void), *mawquf* (conditional), 233-306.

201. Id., 306: *bayan ma yarfa' hukm al-bay'*.

202. *faskh*.

203. *iqala*.



fects invalid or imperfect contracts, whereas novation terminates the perfectly valid contract by mutual agreement of the parties. Having just discussed dissolution, he proceeds with the analysis of the second type, novation.<sup>204</sup>

Kasani's systematic mind is well illustrated in this last chapter of the book of sale, which is divided into four subsections.

The first subsection explains the basis of novation, and the various verbal tenses to be used in order to ascertain the meeting of minds between the offer of one party and the acceptance of the other party. The second subsection discusses the differences between various Hanafi jurists over the nature of novation, with some considering it a variation on sale, while others look at it more as a *sui generis* contract, as *riba* does not really affect it. The third subsection explains the conditions of validity of the novation, which include agreement between the parties, the unity of the contractual session,<sup>205</sup> the transfer of whatever compensation may have been agreed in the novation, and, for some Hanafis, the continued existence of the original object of sale. This is discussed at some length.<sup>206</sup> Kasani concludes with a fourth subsection about the effectiveness of novation, with various examples flowing from the buyer and seller's possession of the original object of sale.<sup>207</sup>

Kasani did not seem encumbered in his summa, *al-Bada'e'*, by a previous commentator, and his outline in each chapter, as well as the transitions within it, belong to the best textbook tradition,<sup>208</sup> if some-

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204. Kasani, *Bada'e'*, v, 306-10.

205. *majlis al-aqd*.

206. Kasani, *Bada'e'*, v, 309.

207. *Id.* at 309-10 bottom.

208. In the opening of his *Bada'e'* (i, 2-3), Kasani acknowledges his debt to his master Samarqandi (d.540/1145), "the only one who gave attention to the arrangement, *tartib*, of legal rules", and explains the need for a new method of presenting and explaining these rules so that students can understand them and follow the law better. The division of the 7 volumes into books (*kitab*, plural *kutub*), is as follows: *tahara* (i, 3-88), *salat* (i, 89-325), *zakat* (ii, 1-75), *sawm* (ii, 75-107), *i'tikaf* (ii, 108-117), *hajj* (ii, 118-227), *nikah* (ii, 228-340), *ayman* (iii, 1-87), *talaq* (iii, 88-228), *zihar* (iii, 229-236), *li'an* (iii, 237-249), *rida'* (iv, 1-14), *nafaqa* (iv, 15-40), *hadana* (iv, 40-44), *i'taq* (iv, 45-111), *tadbir* (iv, 112-123), *istilad* (iv, 123-133), *mukatab* (iv, 133-159), *wala'* (iv, 159-173), *ijara* (iv, 173-224), *istisna'* (v, 1-4), *shufa* (v, 4-35), *dhaba'eh wa sujud* (v, 35-61), *tadhiya* (v, 61-81), *nidhr* (v, 81-94), *kaffarat* (95-111), *ashriba* (v, 112-117), *istihsan* (v, 118-132), *buyu'* (v, 133-310), *kafala* (vi, 1-15), *hawala* (vi, 15-19), *wikala* (vi, 19-39), *sulh* (vi, 39-56), *sharika* (vi, 56-78), *mudaraba* (vi, 79-114), *hiba* (vi, 115-134), *rahn* (vi, 135-175), *muzara'a* (vi, 175-185), *mu'amala* (vi, 185-188), *shirb* (vi, 188-192), *aradi* (vi, 192-196), *mafqud* (vi, 196-197), *laqit and laqta* (vi, 197-203), *abaq* (vi, 203-206), *sibaq* (vi, 206-207), *wadi'a* (vi, 207-213), *'ariya* (vi, 214-218), *waqf wa sadaqa* (vi, 218-221), *da'wa* (vi, 221-266), *shahada* (vi, 266-282), *ruju' 'an al-shahada* (vi, 283-290), *adab al-qadi* (vii, 2-16), *qisma* (vii, 17-32), *hudud* (vii, 33-65), *sariqa* (vii, 65-90), *qutta' al-tariq* (vii, 90-141), *ghasb* (vii, 142-169), *hikr wa habs* (vii, 169-175), *ikrah* (vii, 175-191), *ma'dhun* (vii, 191-207), *iqrar* (vii, 207-233), *jinayat* (vii, 233-327), *khantha* (vii, 327-330), *wasaya* (vii, 394), *qard* (vii, 394-396). It is clear from the last chapter that the book is not complete in its present standard edition. A few important chap-

time verbose for the sheer length of the material.<sup>209</sup> Whether for Hanafi *fiqh* compendia or for other schools, a case can be made of an ever developing refinement of style along those two main lines: overall exposition and outline, and internal coherence including for transitional clauses within a chapter or a section.<sup>210</sup> Style, of course, lends itself to difficult comparisons.

As a word of supplementary caution, a comparison of legal structures may be as attractive as it may be deceiving. To pursue Middle East legal calques of the Jewish-Islamic mode, it is surely alluring to note that the great restatement of the Arab-Jewish scholar Ibn Maimun (d. 600/1204), better known as Maimonides, was a contemporary of Kasani. Ibn Maimun's celebrated philosophical work, *The Guide to the perplexed* was written in Arabic in 586/1190,<sup>211</sup> a year before the great Hanafi jurist died. Even more alluring is the fact that Maimonides was, like Kasani for Islamic law, the first scholar who put some order<sup>212</sup> into the disheveled layers of the legal tradition he inherited, in the form of the famous *summa* known as *Mishneh Torah* ('the second Torah'), the construction of which was the basis for the authoritative structure, to the present day, of his great Span-

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ters are also missing, such as the book of intestate succession (*fara'ed*). Compare the list on the structure of the *Mabsut*, supra n. 138.

209. For an appreciation of the treatment of each of these chapters, it is useful to keep in mind that an average page in the current edition of Sarakhsi's *Mabsut* includes some 400 words, against 700 words for an average page in Kasani's *Bada'e'*. There are over 6,000 pages in Sarakhsi *Mabsut* (i.e., circa 2,500,000 words), against 2,100 pages (i.e., ca 1,500,000 words) in Kasani's *Bada'e'*. This makes Kasani's work about 60 per cent the length of Sarakhsi's *summa*. In comparison, the present study is some 65,000 words-long.

210. One should also compare this structure with classical law books amongst Shi'i jurists, which include the general separation between acts of devotion and transactions, with nuances such as a quadripartite distinction in al-Muhaqqiq al-Hilli's (d.676/1277) *Shara'e' al-Islam*, 4 vols, (Najaf 1969), see Hossein Modarressi, *An introduction to Shi'i law*, (London 1984), 18-22. One should also note the importance of some books and passages for Shi'is which one will not find discussed extensively among Sunnis, generally on matters involving the Shi'i *imams*, such as specific taxation, or the role of the jurist. Among the modern scholars, Muhammad Baqer al-Sadr (d.1980) has suggested a novel, more reasoned typology, but it has not been yet adopted by other jurists. See my *Renewal of Islamic law* 13-14. The extensive treatment of any one topic in the large books makes the issue slightly redundant, and a good thematic index will do the trick, such as in the model alphabetical six-volume rearrangement by Khaled al-'Atiyya, *Mu'jam fiqh al-jawaher* (Beirut 1996), of the large 19th century compendium of Muhammad Hasan Najafi (d.1266/1850), *Jawaher al-kalam*, 15 vols. (Beirut 1992). Najafi's *Jawaher* is a super-commentary on Hilli's *Shara'e'*.

211. Ibn Maimun, *Dalalat al-ha'irin*, ed. by Muhammad Zahed al-Kawthari, Cairo 1369/1949. The full title of the *Dalalat* is *al-Muqaddimat al-khams wal-'ishrun fi ithbat wujud Allah wa wahdaniyyatih wa tanazzuhih min an yakun jisman aw quwwatan fi jism min dalalat al-ha'irin*: the 25 prolegomena in the proof of the existence of God, his uniqueness, his not being a body or a potentiality of a body, a guide to the perplexed. The argument of the *Dalalat* is one clearly reminiscent of the dispute over the creation of the Qur'an, see infra n. 487 and accompanying text.

212. The title of Kasani's work is *tartib al-shara'e'*, a conscious choice by the author of the need "to put order in the knowledge of the law".

ish-Ottoman successor Rabbi Yosef ibn Ephraim Karo (d.982/1575), *Shulhan Arukh* ("the prepared or set table").<sup>213</sup>

Less compelling, however, is a closer comparison between the structure of the great works of all these scholars in the proposed Middle East legal *koine*. Maimonides' works may be said to resemble, in many ways, the structure of Kasani's *summa*, but the chapters or books do not correspond on a one-to-one basis.<sup>214</sup> Somewhat more appealing from a comparative perspective is the structure of four books adopted by Karo after the *Tur* (row) tradition (ca 1340) of his Spanish predecessor Jacob ibn Asher. The first book covers liturgy, the second rituals, the third family law, and the fourth transactions and the judiciary.<sup>215</sup> One can identify in both Kasani's and Sarakhsi's *summas* clusters of books which share a similar quadripartite logic. As in all legal comparisons, however, limitations are inherent to the exercise, and depend on the measures and criteria chosen. Good thematic indexes serve their purpose better, in terms of general scholarly use of the large compilations, than a search for sophisticated architectonics which are too general, and not always meaningful.<sup>216</sup>

The brief remarks on the structure and development of *fiqh* literature can help assess a number of theses strongly connected with the perception of Islamic law, in the West as well as in the East, and

213. Ibn Maimun fled Spain, which the Almohads conquered in the 12th century forcing conversion to Islam, and settled in Fustat-Cairo, where he died in 605/1204. Karo was also a Spanish refugee, fleeing this time the intolerance of the Catholic Reconquista, and settling in Ottoman-ruled Greece then Palestine. On these central legal scholars of Judaism, see *An introduction to Jewish law*, especially at 277-79 (chapter by Eliav Schochetman) and 339-43 (chapter by Stephen Passamanek), respectively. Great jurists were never free from the rulers' ire, even if they shared their religion. Kasani fled his native Farghana, near Tashkent, to Aleppo, and Sarakhsi spent, as we saw, a long time in prison.

214. Maimonides' *Mishneh Torah* is also known as 'the fourteen books', in Hebrew *yad hahazakah*, divided as follows: book 1. (*sefr* in Hebrew and Arabic, but the Islamic scholars use *kitab*) Knowledge (theology), 2. Adoration (prayer, worship), 3. Seasons (sabbath, festivals), 4. Women (family law, marriage, divorce), 5. Holiness (ritual prohibitions, incest, dietary restrictions), 6. Asseverations (oaths and vows), 7. Agriculture, 8. Service (at the temple), 9. Offerings, 10. Purity (ritual purity), 11. Torts, 12. Acquisition (sales etc), 13. Civil laws, 14. Judges (administration of justice). A scholarly English edition of most of the *Mishneh Torah* was published at Yale in the Judaica series, starting in 1949.

215. *Shulhan Arukh* consists of four parts: (1) *orah hayyim* ("parts of life") - daily, sabbath, and festival laws; (2) *yoreh de'ah* ("the one who imparts knowledge") - dietary laws; relations with non-Jews; usury; menstruation; vows and oaths; charity; circumcision; proselytes and slaves; offerings; the ban; illness, death, burial, and mourning regulations; (3) *even ha'ezer* ("the rock of help") - procreation, marriage, divorce; (4) *hoshen hamishpat* ("breastplate of justice") - Laws about judges and witnesses; loans and claims; agencies and partnerships and neighbors; pecuniary transactions, loans, sales, bailment; legacies and inheritance; theft, robbery, homicide, battery, damage and injury.

216. 'Atiyya's *Mu'jam*, cited supra n. 210, is a powerful model with no equivalent to my knowledge for Sunni treatises, although the indexes available in some new editions of Ibn Qudama's *Mughni*, Mawardi's *Hawi*, Ibn Hazm's *Muhalla*, and others are extremely helpful.

show the need to be more cautious in the assessment of the field. In short, one should abandon the belief that Islamic law does not or did not develop because of the authors' attachment to precedents established either during the Prophet's time, or during the formative stages of jurisprudence in the second and the third centuries after the Islamic revelation. The structure and terminology, and consequently substantive rules themselves, get refined and changed through the centuries. This is clear in the different treatment of the law of sales by Sarakhsi in comparison to the earlier Shaybani. It is also clear, within a shorter period of time, in the much more systematic treatment of the contract of sale by Kasani in comparison to Sarakhsi, as we have just seen.

While difficult to document because of the sheer weight and complexity of the material, and the persistence of both structural and substantive legal calques, there have been other examples of demonstrably substantive change in at least three important legal areas: one is the passage to "intention", in a determined way, in the texts of the later period.<sup>217</sup> Another is the acceptance, amidst strong resistance of 'conservative' jurists, of movables as the subject of a trust.<sup>218</sup> A third appears in the changes introduced to the Hanafi doctrine of land ownership in order to accommodate the taxation of private property in the 10th/16th century.<sup>219</sup> All these can be found in the arguments of the jurists in 'classical' treatises, and they may include structural, stylistic and substantive matters.<sup>220</sup>

Like all laws, the change operates on the basis of precedent and analogy, with some texts acquiring more importance or authority, naturally with the Qur'an and the *hadith* as canonical references, but including also the authoritative treatises of respected scholars.

Part II will be published in the next issue.

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217. See vol.2 in Chafik Chehata, *Etudes de Droit Musulman*, 2 vols. (Paris 1973).

218. Mandaville, "Usurious piety: the cash *waqf* controversy in the Ottoman empire," 10 *International Journal of Middle Eastern Studies* 289-308 (1979).

219. Baber Johansen, *The Islamic law on land tax and rent* (London 1988), and my review in 54 *Bulletin of the School of Oriental and African Studies* 155-56 (1991).

220. Change can be documented differently: in the law of divorce, documents show the strong adaptation, in recent Moroccan notary-public documents, of enhanced powers of the wife in the formularies of the 19th century in contrast to those found in Maliki texts from Granada in the 12th century. See the section on formulae *infra*.